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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Big Sespe Oil Company, a Corporation Formed, Organized and Existing Under and by Virtue of the Laws of the State of California, and a Citizen and Resident of the Said State,
Defendant-Appellant,

versus

William H. Cochran, a Citizen of the State of New York,
Complainant-Appellee,

and

William H. Cochran as Trustee for Pacific Crude Oil Company,
Intervening Complainant-Appellee.

BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

Under the rules of this Honorable Appellate Court, no "Statement of the Case" is ordinarily required in the appellees' brief. Exception, however, is made

where such likewise particularly required statement in the appellant's brief, "is controverted" by the appellees. (Rule 24, par. 3.)

Appellees seriously controvert the statement or "abstract of the case" as set forth in appellant's brief in this cause, in that, in certain particulars, it is neither accurate nor complete; and also in that it states certain facts, and certain conclusions or inferences on what the record on this appeal shows or fails to show, which are not supported by that record.

It seems to appellees, that were they to here specifically and in detail set out these points of controversy, they would be imposing an undue burden on the court, by setting forth at some necessarily considerable length, what later must be repeated, and what, also under the rules, must be clearly stated and discussed in the argument in this brief. In that argument, appellees will clearly point out and show the inaccuracies and imperfections of appellant's "abstract of the case."

Appellees, therefore, respectfully request this Honorable Court's consideration of this general objection, with the assurance that the specific and detailed grounds thereof, will be fully presented and shown later in the course of appellees' argument in this brief.

Appellant's assignment of errors, and also the arguments and contentions presented by appellant's brief, naturally divide themselves into three separate subdivisions or classes: 1. Questions going to the jurisdiction of the District Court; 2. Questions which go

to the case as a whole; and 3. Questions on the merits or facts in the case.

Appellees' argument will consider and discuss such questions accordingly, and in that order.

BRIEF OF APPELLEES' ARGUMENT.

FIRST POINT.

The District Court Had and Properly Assumed Original Jurisdiction of This Suit, as It Is a Suit in Equity Between Citizens of Different States of the United States, and in Which the Matter in Controversy Exceeds, Exclusive of Interest and Costs, the Sum or Value of Three Thousand Dollars, and Such Jurisdiction Continued Unimpaired, and Was Lawfully Continued to Be Exercised by the Said Court Throughout the Entire Proceedings in the Suit.

I.

Statement of Appellant's Claimed Jurisdictional Question.

The Honorable District Court's jurisdiction was invoked by complainant, solely on the ground—as properly and specifically alleged in the bill—of the diversity in the citizenship of the parties to a suit in equity, in which the sum or value of the matter actually in controversy exceeded three thousand dollars. Such juris-

diction is, therefore, dependent upon these two jurisdictional elements in the suit.

It has not be questioned, and, in fact, it is conceded by all the parties to this suit, and is also established by the evidence, that the matter in controversy herein exceeds the necessary jurisdictional sum or value of three thousand dollars, as prescribed and limited by "The Judicial Code."

Appellant, however, questions and attacks on this appeal, for the first time, the District Court's jurisdiction in this suit, because—as appellant asserts in its "Assignment of Errors"—of the insufficiency of evidence to show diversity of citizenship of the parties hereto.

Appellant's contention in this particular, is set forth in its assignment of errors in the following language:

"65. The court erred in not finding and decreeing that it had *no jurisdiction* of this action or of the subject matter thereof, and in not ordering and decreeing a dismissal of the bill of complaint herein, *on the ground and for the reason that the evidence was insufficient to show* that the cause of action was one between citizens of different states of the United States."

The only other assigned errors which at all involve this question of jurisdiction, are numbered 63 and 64. These are of practically the same purport and effect—the one being but a negative of the other—that the District Court "had no jurisdiction," and accordingly should have dismissed the bill. But no

cause or reason is assigned in support of this general statement against jurisdiction. That these particularly assigned errors are, however, based on the same claim as is set forth in assigned Error No. 65, quoted *supra,* is clearly evidenced by appellant's "Abstract of the Case," wherein appellant asserts, as the only ground for its claim against jurisdiction, the insufficiency of evidence to show diversity of citizenship between the parties. In fact, there can not possibly be any other claim against jurisdiction in this suit, than want of diversity of citizenship.

It should be particularly noticed that appellant thus clearly distinguishes between any possible failure of the bill to plead the essential jurisdictional facts (which is not claimed by appellant), and the asserted deficiency of proof on that subject, in the evidence. This distinction is of vital importance in determining the principles and rules of law applicable to the actual question presented on this appeal; and also in construing and determining the applicability of any decisions, which may be cited as authorities on the general question of jurisdiction.

Appellant concedes, as it has not questioned the propriety and legality of its having been done, that, because of these properly alleged jurisdictional facts, the District Court, immediately upon the filing of the bill, had plenary jurisdiction over the cause, and lawfully assumed the same; and that, at least up to the entry of the interlocutory decree, the court properly continued to exercise such jurisdiction.

This is certainly made clear by appellant's assignment of errors, in which the only specific error against the District Court's exercise of jurisdiction is limited to the court's not having ordered a dismissal of the bill herein on the ground that *"the evidence was insufficient* to show that the cause of action was one between citizens of different states." (Error No. 65, cited *supra.*) A condition which, even if true, could have arisen only after the hearing in the cause had proceeded and had been completely finished.

In passing, it may properly be called to the attention of this Honorable Court, that at no time did either of the defendants raise any issue, or present any question, in the District Court, on the bill's specifically alleged diversity in the citizenship of the parties to the suit; or on the likewise alleged resultant jurisdiction of the District Court; nor did either of the defendants ever make any motion whatsoever to dismiss the bill because such diversity in citizenship did not actually exist; or for the District Court's want or failure of jurisdiction from any cause whatsoever. Both these questions, of diversity of citizenship and of failure of jurisdiction, are raised for the first time in this suit, on this appeal.

Diversity in the citizenship of the parties being the only questioned essential element of jurisdiction, the questions naturally arise:

1. How such element should appear in the suit, to justify the court's not only having assumed to take

jurisdiction of the suit at its commencement; but also having continued to exercise such jurisdiction to the suit's final termination?

2. How any issue as to such diversity of citizenship should and must have been raised and presented? And

3. On which of the parties rested the burden of proof in connection with such an issue, even if and when it has been properly raised and presented?

Appellees' contentions on these several points will be fully presented later in this brief; but their answers to these several questions may be generally stated as follows:

1. The allegations of the bill which properly show diversity in the citizenship of the parties to the suit, were and are *prima facie* to be taken as true; and were sufficient not only to confer, but also to continue jurisdiction until the contrary of such allegations was properly and lawfully affirmatively proved and established to be the fact, and that the court was thus without lawful cognizance of the suit.

2. An issue of jurisdiction should, and, if at all, must have been raised by the answer to the bill. And such answer should have contained a specific denial of the bill's alleged jurisdictional facts, upon which complainant relied to sustain the District Court's jurisdiction. And if such alleged jurisdictional facts were not thus specifically denied by the answer, they shall

be deemed to be confessed by defendants; and shall be taken and considered as true for all the purposes of the suit;

3. The diversity in the citizenship of the parties having been properly alleged and shown by the bill, and even if any issue thereon had been properly raised by the answer, the burden was on defendants to defeat the resultant jurisdiction, by showing and establishing, through sufficient legal proofs, that such allegations of the bill were untrue.

II.

The Properly Alleged Diversity in the Citizenship of the Parties to This Suit, Was Not at Issue in the District Court and, in Fact, Defendants Conceded Such Diversity to Exist. Nor Was the District Court's Jurisdiction of This Suit at Issue, or Ever or at All Questioned in That Court.

A.

The Pleadings Present No Issue as to the Bill's Properly Alleged Diversity of Citizenship of the Parties: Nor as to the Likewise Properly Alleged Jurisdiction of the District Court.

Before entering upon any consideration of the pleadings in this suit, it is pertinent to briefly refer to the Supreme Court rules regulating the practice in suits in equity, in so far as such rules prescribe the necessity and the form of pleading jurisdictional facts; and

likewise how any issue thereon shall and must be raised and presented.

The essential jurisdictional allegations for the bill of complaint are prescribed by Equity Rule 25, which, in part, provides as follows:

> "Rule 25. Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:
>
> *"First,* the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. * * *
>
> *"Second,* a short and plain statement of the grounds upon which the court's jurisdiction depends."

The necessary form and contents of the answer to the bill of complaint is prescribed by Equity Rule 30, which provides, in part, as follows:

> "Rule 30. The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but *specifically admitting or denying or explaining* the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. *Averments* other than of value or amount of damage, *if not denied, shall be deemed confessed"* etc.

We pass now to the pertinent allegations and statements of the bill, and of the answer in this suit; and

to their consideration in the light of the equity rules just cited.

The introductory part of the bill of complaint in this suit sets forth that"*William H. Cochran, a citizen of the state of New York,* brings this his bill of complaint against" the named *defendants who are citizens of the state of California,* and resident within the District Court's jurisdiction.

The bill then alleges as follows:

"*First. Jurisdiction* of this case *arises, and is given* to this Honorable Court, *by reason of the diversity of the citizenship of the parties hereto.* Complainant is now, and always has been a citizen of the state of New York.

"Complainant's hereinafter particularly mentioned and described assignor, Pacific Crude Oil Company, is a corporation formed, organized and existing under and by virtue of the laws of the state of Delaware, and is also a citizen of the said state of Delaware."

These allegations are supplemented by further allegations in the same paragraph "First" of the bill, that both defendants are citizens of the state of California, and residents within the District Court's jurisdiction; and that the amount in controversy exceeds the sum or value of three thousand dollars.

The joint and several answer of the two defendants, to this bill of complaint, says, *inter alia,* as follows:

"I"

"*Defendants* have no knowledge or information sufficient to enable them to form a belief as to the truth

of the allegation in paragraph 'First' of complainant's bill, that complainant is now and always has been a citizen of the state of New York, and basing their denial upon that ground, *deny that complainant is now,* or always, or at any time has been, *a citizen of the state of New York.*

"Otherwise than as herein set forth, defendants admit every allegation of paragraph 'First' of said bill."

It surely is apparent that the *sole issue* thus raised by this portion of the answer, *is whether or not the complainant was a citizen of the state of New York* at the time of the filing of his bill in this suit; and also further that, *aside from that issue, defendants admitted each and every other of the above quoted allegations of the bill* to be true, both in fact and in law.

What did defendants thus admit?

Equity Rule 25 requires simply "a short and plain statement of the grounds upon which the court's jurisdiction depends"; which with the other specified statements (not jurisdictional) *"shall be sufficient"* for a proper bill.

This requirement of the rule was fully met by the allegation in the bill, that *"jurisdiction of this case arises* * * * by reason of the diversity of the citizenship of the parties."

This bill, however, also went much further than merely alleging that jurisdiction thus *"arises,"* for it further also specifically alleges that *"jurisdiction*

* * * *is given"* by reason of the properly and sufficiently well alleged diversity of citizenship.

Defendants' answer presents no denial of either of these particular allegations of the bill; or even a denial that such diversity in citizenship actually existed.

Defendant's only denial is limited to the allegation of complainant's citizenship in the state of New York. While their admissions unquestionably admit the truth of every other allegation of this paragraph "First" of the bill.

If defendants had actually and in good faith intended to raise and present any issue as to jurisdiction, can it be questioned but that they should have denied such alleged diversity in citizenship, and also that the alleged jurisdiction in fact existed? And also have further denied that the alleged jurisdiction was *"given"* to the District Court by reason of such alleged citizenship?

These just quoted allegations of the bill certainly required some answer. And, if not denied, their truth is deemed to be confessed by defendants, under the provisions of Equity Rule 30. Defendants' answer certainly presents no denial of either of the allegations. *These allegations must, therefore, either be included within the allegations of the bill which are formally admitted by the answer to be true: or being unanswered and not denied, must be deemed to be true.*

In either event, the result is the same, to-wit, that the answer raised no issue either as to the bill's prop-

erly alleged diversity of citizenship of the parties to the suit; or as to the likewise alleged jurisdiction of the District Court. These allegations of the bill, consequently, must be deemed to be true; and must be so acted upon for all the purposes of this suit.

That a formal denial of the bill's properly alleged jurisdictional facts was vitally essential to any attempt to impeach the court's jurisdiction, was early laid down by the Supreme Court. Amongst these early decisions is:

> Sheppard v. Graves, 14 How. 505, 515, 14 L. Ed. 518,

in which the Supreme Court *held:*

> "Although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet, *wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken prima facie as existing, and that it is incumbent on him who would impeach that jurisdiction for causes de hors the pleading to allege and prove such causes: that the necessity for the allegation* and the burden of sustaining it by proof both *rest upon the party taking the exception.*"

Nor is the doctrine as here presented, at all in conflict with the rule of law which prevents a court

from assuming jurisdiction on the mere consent of parties. For as was said by the Supreme Court in

Denny v. Pironi and Saltri, 141 U. S. 121, 35 L. Ed. 657, 658, and

Pittsburg, C &. St. L. R. Co. v. Ramsey, 89 U. S. 322, 22 L. Ed. 823.

> "While consent of *parties* cannot give the courts of the United States jurisdiction, they *may admit facts which show jurisdiction, and the courts may act judicially upon such admission.*"

B.

To Raise Any Issue of Jurisdiction, Defendants' Answer Should Not Only Have Made Specific Denials of the Jurisdictional Averments of the Bill, but Also Should Have Affirmatively Alleged That Complainant Was a Citizen of the State of California.

It has been already discussed and shown, *supra,* that, in order to raise any issue on the bill's properly alleged jurisdiction of the District Court, it was essential that defendants, by their answer, should have made specific denials of the jurisdictional allegations of the bill.

In addition to such jurisdictional denials, *the answer also should have affirmatively alleged that complainant was, in fact, a citizen of the same state as were the defendant, to-wit, the state of California.*

And appellees respectfully submit that it is only on such denials and such affirmative allegation, that an issue of jurisdiction could be raised.

While the defendants deny—because of want of knowledge—that complainant is a citizen of the state of New York, such a denial is in no sense inconsistent with, or opposed to their admission of the District Court's jurisdiction on the ground of the diversity of the citizenship of the parties. Such a limited and specific denial of complainant's citizenship in New York, certainly can not be construed as a denial of the bill's entirely distinct allegations of diversity of citizenship and of jurisdiction. Defendants do not allege or even suggest that complainant is a citizen of California. And it is citizenship in that state only — because of defendants' citizenship therein — which could prevent the court's exercise of jurisdiction in this suit. The particular state of complainant's citizenship is, therefore, an immaterial question, so long as there is no claim of such citizenship in California.

If defendants had really intended to raise the issue of jurisdiction, and to endeavor to defeat complainant's properly alleged claim of jurisdiction, *they should not only have denied the alleged diversity in citizenship, and that such jurisdiction existed and was "given" to the District Court, but also, instead of merely denying that complainant is a citizen of New York, should have affirmatively alleged such citizenship to be in California. Such an affirmative allegation was essen-*

tial to raise the issue of jurisdiction. The sole issue presented by the pleadings, is an immaterial one.

This very same point was presented to the Circuit Court of appeals for the Seventh Circuit, and was thus passed upon and held, in

Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25.

In that case, there were proper averments in the complaint showing that the plaintiff was a citizen of Indiana, and the defendant a citizen of Illlinois. To this complaint, defendant filed his plea to the merits, and also his plea in abatement for want of jurisdiction *on the ground that the plaintiff, Shirk, also was a citizen of Illinois.* This issue, the citizenship of the plaintiff below, the defendant in error, Shirk, became one of the controverted questions on the trial. It was urged upon the appeal that the plaintiff below had the burden of showing that at the time of the commencement of the action he was a citizen of the state of Indiana. On this subject, the court says:

> *"The question is not,* as plaintiff in error contends, whether *defendants in error have discharged the burden of proving that Elbert W. Shirk was a citizen of Indiana.* The proper allegation of jurisdictional facts, *prima facie,* was true. *Simply to deny that Elbert W. Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, whereof plaintiff in error was a citizen. That Elbert W. Shirk was a citizen of Illinois was a material and necessary allegation."*

A petition for a writ of certiorari to review this decision, was denied by the Supreme Court.

180 U. S. 638, 45 L. Ed. 710.

Moreover, the case was approvingly cited and followed by the Supreme Court, in

Hunt v. New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821.

The same point was similarly passed upon by the Circuit Court of Appeals, for the Eighth Circuit, in

Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633.

In that case, the complaint properly stated that the plaintiff was a citizen of the state of Illinois, and the defendant a corporation organized under the laws of Missouri. The answer went to the merits of the controversy, and also contained a general denial which it was claimed put in issue the citizenship of the plaintiff. The only testimony on this point was the plaintiffs' statement that he resided in Vandalia, Illinois.

In its opinion, at page 248, the Appellate Court says:

> "What the defendant is attempting to do is to challenge the jurisdiction of the court, and in order to do that *he must not simply deny the citizenship as alleged in the complaint, but must allege affirmatively facts showing that the plaintiff and defendant are citizens of the same state,* or make such other averments as shall show directly that the cause is beyond the lawful cognizance of the court."

The opinion also approvingly cited and followed *Adams v. Shirk,* as cited *supra,* in this brief.

The Supreme Court denied a petition for a writ of certiorari.

214 U. S. 517, 52 L. Ed. 1064.

In *Adams v. Shirk,* the plea affirmatively and specifically set up that the parties to the suit were citizens of the same state. *And* it was held this was *"a material and necessary allegation"* to a plea against jurisdiction.

In *Hill v. Walker,* the answer simply denied the plaintiff's citizenship as particularly alleged in the bill. And that is exactly the same and the only denial that is made by the answer in this suit. The Appellate Court *held* in that case that such a denial was insufficient to raise any issue of jurisdiction, as the answer also *"must allege affirmatively facts showing that the plaintiff and defendant are citizens of the same state."*

C.

The Averments of the Bill of Complaint as to the Citizenship of the Respective Parties to the Suit, Are Prima Facie to Be Taken as True; and the Burden of Disproving Them Rests on the Defendants.

Appellees further contend and respectfully submit that, in any event, the several allegations of the bill of complaint as to the citizenship of the respective parties to this suit, and by which allegations the diversity of the citizenship of the parties, and the jurisdiction of the

District Court is shown, were to be taken by the trial court as *prima facie* true; and that if defendants sought to question such alleged citizenship and the resultant jurisdiction, the burden was on them to have not only specifically denied, but also to have affirmatively disproved such allegations of the bill.

As has been already shown, defendants have admitted by their answer, the truth of these allegations of the bill. But even assuming for the purposes of this argument, that defendants had not made any such admissions, and had specifically denied the jurisdictional averments of the bill, appellees contend that the burden then would have been on defendants to have affirmatively established by proper proofs, that these allegations of the bill were erroneous or not true, and that the District Court, in fact, did not have jurisdiction of the suit.

Appellant raises no question as to the citizenship and residence of the defendants having been properly and truthfully alleged in the bill; but seeks on this appeal, for the first time, to question complainant's properly alleged citizenship, as the basis of its claim against the district court's jurisdiction.

The only error assigned by appellant, which is at all pertinent to this question, is the assigned error No. 65, which is fully quoted, *supra*. The substance of that error is that *"the evidence was insufficient to show"* the diversity of citizenship of the parties to the suit.

The gist of this assigned error is that the evidence was insufficient to support the allegations of the bill in

these particulars; and that the evidence should have affirmatively proved and established such allegations. And appellant contends that the burden of such proof rested on complainant.

Such, however, is not the proper nor correct rule of law, either as to the necessity of any evidence to sustain the bill's properly alleged jurisdictional facts, or as to the burden of proof on such a jurisdictional issue, even if and when properly raised by the pleadings.

The true and long and well established rule of law as to the burden of proof on such an issue, is summarily stated by Simkins in his treatise entitled *"A Federal Equity Suit"* (3rd edition) at page 125, as follows:

> *"The burden of proof is on the defendant to defeat jurisdiction when the issue is raised."*

And again, at page 129, he says:

> "As before said, *the burden of proof is on the defendant to prove to a 'legal certainty' facts relied upon to defeat the jurisdiction."*

And the writer cites numerous cases as authority for his text.

An examination of the opinions of the several federal courts in which this question has been considered and discussed, and this rule of practice and of law enunciated, shows that the rule has been uniformly based on the ground that allegations of jurisdictional facts in the bill, create a prima facie case in favor of jurisdiction.

This rule was thus early laid down by the Supreme Court; and has been repeatedly reiterated and reaffirmed. While there are several earlier decisions wherein it was likewise *held,* this doctrine or rule was thus first clearly and fully stated by the Supreme Court, in 1852, in the case of

Sheppard v. Graves, 14 How. 505, 512, 14 L. Ed. 518,

in the following language:

> "With respect to the exception taken to the ruling of the District Court, *as to the obligation of the defendant to prove his averment of the plaintiff's residence in the state of Texas, and not of Louisiana,* as set forth in the petition, were the decision of this question deemed requisite here, we should say that the true doctrine applicable to the question is this: that although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, *yet wherever jurisdiction shall be averred in the pleadings,* in conformity with the laws creating those courts, *it must be taken prima facie as existing, and that it is incumbent on him who would impeach that jurisdiction* for causes *de hors* the pleading, *to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception."*

The doctrine as thus laid down, has been repeatedly reiterated and reaffirmed in numerous subsequent decisions of the Supreme Court. The more important

cases which are most generally cited and quoted as the leading authorities, are:

DeSobry v. Nicholson (1865), 3 Wall. 420, 18 L. Ed. 263.

Wetmore v. Rymer (1898), 169 U. S. 115, 42 L. Ed. 682.

Hunt v. New York Cotton Exchange (1907), 205 U. S. 322, 51 L. Ed. 821.

In *Hunt v. New York Cotton Exchange,* the plea to jurisdiction directly raised an issue as to whether or not the amount in controversy was sufficiently large to satisfy the jurisdictional requirements of the statute. On this point of the burden of proof on that issue, the opinion, at page 333, says:

> "On the issue presented by the plea *the burden of proof was upon the appellant, and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount.* Sheppard v. Graves, 14 How. 505; Wetmore v. Rymer, 169 U. S. 115; Gage v. Pumpelly, 108 U. S. 164; Adams v. Shirk, 117 Fed. 801."

That decision, which was rendered in 1907, is of particular interest and importance as it cites *Sheppard v. Graves* in support of this proposition as to the burden of proof. Thus clearly indicating that the rule declared in the much earlier decisions has not been changed in any particular, not even by the Conformity Act of 1872, or by the Act of March 3, 1875, which will be presently referred to.

A full summary and discussion of the decided cases on this subject, is set forth in the very able and voluminous opinion of the Circuit Court of Appeals for the Eighth Circuit, in

Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633.

In order that this brief may not be unduly burdened with less efficient and unnecessary repetition of such presentation and discussion of those numerous authorities, appellees respectfully ask this Honorable Court's examination and consideration of the full opinion in that case.

The Supreme Court not only denied a petition for a writ of certiorari in *Hill v. Walker* (214 U. S. 517; 53 L. Ed. 1064), but has also approvingly cited the case in later of its own decisions.

This very same question was still later again presented to the Supreme Court, in

Chase v. Wetzlar (1912), 225 U. S. 79, 56 L. Ed. 990.

In that case, the appellant cited the several authorities cited *supra* in this brief, in support of the very same contention and doctrine as is here contended for by these appellees.

The Supreme Court held that such authorities were not pertinent to that particular case "which involved a question of jurisdiction under section 8 of the Act of 1875." (Re-enacted as S. 57 of the Judicial Code.) Under the provisions of that section of the act, the

District Court is given jurisdiction over any suit to enforce a lien upon property within the district where such suit is brought, even though the defendants shall not be inhabitants of or found within said district.

After referring to the fact that these cited authorities did not involve the particular jurisdictional question then presented to the court in that case, the opinion continues as follows:

> "On the contrary, they all concerned merely the sufficiency or verity of allegations as to the citizenship of parties or the value of the matter in dispute. The cases rested, therefore, upon the proposition that averments concerning such matters were *prima facie* to be taken as true, and hence the burden of truth was cast upon the one assailing the sufficiency or want of verity of such averments. We do not deem it necessary to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875, requiring a federal court *of its own motion* to dismiss a pending suit *when it is found* not to be really within its jurisdiction (cases cited)—because we think, in any view, the doctrine is here inapplicable. *We say this because, while questions concerning the sufficiency or verity of averments as to citizenship or amount in dispute assail the jurisdiction of the court, they do not address themselves to the want of all foundation for judicial action because of an entire absence of elements which are essential to the existence of any jurisdiction whatever,—that*

> *is, the presence of persons or property within the jurisdiction of the court, over which its authority may be exerted.* The character of the questions involved in the cases relied on, and the nature of the rule as to *prima facie* presumption as to the adequacy of averments concerning such subjects, and the resultant burden of proof, is at once demonstrated by the well-settled rule that questions of that character do not go to the power of the court to make a binding decree." (Cases cited.)

Aside from the fact that the Supreme Court thus points out the theory of law on which this doctrine as to the burden of proof on a jurisdictional issue is founded, there are at least two very important features of that opinion, which are worthy of attention.

One, that the Supreme Court in no way repudiates or even suggests any modification of the doctrine as laid down in the authorities cited and referred to in that case, and which are also cited, *supra,* in this brief.

And the other, that the only reference to the Act of 1875, is to that act's requiring a court of *its own motion* to dismiss a suit *when it is found* not to be really within its jurisdiction.

Appellees recognize that even though the jurisdictional averments of the bill are *prima facie* to be taken as true, and that thereby plenary jurisdiction was conferred upon the District Court immediately on the filing of the bill, yet if thereafter, at any time, it should appear to the satisfaction of the court that the suit was not properly within its jurisdiction, the court, on its

own inquiry and on its own motion, may dismiss the suit, even if no issue of jurisdiction was raised by the pleadings.

Such a course of procedure is provided for by S. 37 of the Judicial Code, which is but a re-enactment of section 5 of the Act of March 3, 1875, C. 137, S. I. 18, Stat. 470 (U. S. Comp. Stat. 1901, p. 505), referred to by the Supreme Court. That section provides as follows:

> "S. 37. If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

By its decision in 1907, in *Hunt v. New York Cotton Exchange, cited supra, the* Supreme Court has clearly held that this Act of 1875 in no way altered the then long established doctrine or rule as to the *burden of proof on a properly rasied issue of jurisdiction.*

Moreover, this Act of 1875 was solely intended to meet and cover a long patent defect in legislation and practice, which prevented the trial court from dismissing a suit for want of jurisdiction, unless a plea to such jurisdiction—if properly alleged in the bill, or otherwise shown in the record—had been actually made and filed in the suit. If such a plea was not made, the court could not dismiss the bill. But by this act the court was empowered to dismiss the bill, at any time, for want of jurisdiction, when "it shall appear *to the satisfaction*" of the said court, that jurisdiction actually and in fact does not exist, and no matter how such fact may be questioned or appear on the record.

But even under this statutory provision, the Supreme Court has laid down a doctrine, and prescribed a rule as to the weight of evidence essential and necessary to justify the court's dismissal under the statute, which is exactly analogous to the doctrine and rule theretofore laid down and prescribed as to the burden of proof on a formally raised issue of jurisdiction. See:

Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729.

Hartog v. Memory, 116 U. S. 588, 29 L. Ed. 725.

Wetmore v. Rymer, 169 U. S. 115, 42 L. Ed. 682.

In *Barry v. Edmunds,* the complaint contained proper jurisdictional allegations; and a plea was filed to the court's jurisdiction. The Supreme Court *held* that

when the complaint contains proper jurisdictional allegations, the trial court is not justified in dismissing a cause for want of jurisdiction,

> *"Unless the facts, when made distinctly to appear on the record, create a legal certainty of the conclusion. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account, shall appear to the satisfaction of said Circuit Court."*

Hartog v. Memory is particularly of importance on the question of what evidence can be considered by the court, as the basis for a dismissal of the bill. In that case, jurisdiction was based on the bill's allegation of diversity of citizenship. The answer contained a general denial. There was evidence tending to show that both parties to the suit were aliens. And the trial court, for that reason, on motion of the defendant, and after verdict, dismissed the cause for want of jurisdiction. In reversing this dismissal, the Supreme Court in its opinion refers to the statute of 1875, and the causes which led to its enactment, and at page 590, says:

> "Neither party has the right, however, *without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record except by a plea to the jurisdiction or some other appropriate form of proceeding.* The case is not to be tried by the parties as if there was a plea to the jurisdiction when

no such plea has been filed. *The evidence must be directed to the issues, and it is only when the facts material to the issues show there is no jurisdiction* that the court can dismiss the case upon the motion of either party."

And again at page 591:

"But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. *Barry v. Edmunds,* 116 U. S. 550."

In *Wetmore v. Rymer,* the Supreme Court in reversing the dismissal of the bill by the trial court, considers this Act of 1875 in the following language:

"The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such a question, when raised, shall be determined. When *such a question* arises in an action at law its decision *would usually* depend upon matters of fact, and also usually *involve a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint.* Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different states, or when, as in the present case, the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied."

This opinion also further says:

> "Applying the law as heretofore stated by this court, in the cases cited (Barry v. Edmunds, and Hartog v. Memory), *that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion,* we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant a dismissal of the action for the want of jurisdiction."

The record on this present appeal clearly shows that this cause presents not even one of the conditions particularly specified in these decisions of the Supreme Court.

In this suit, no issue was raised by defendants' answer as to the bill's properly alleged diversity in the citizenship of the parties; nor as to the likewise properly alleged jurisdiction of the District Court. In fact, both such jurisdictional averments were formally conceded by defendants.

Defendants made not even a suggestion to the honorable trial court that, in fact, neither diversity of citizenship nor jurisdiction actually existed. Nor did defendants make any motion to dismiss the bill for want or failure of jurisdiction on either of such grounds. Nor did they oppose the making and entry of either the interlocutory or the final decree herein, for either of said causes, although filing and arguing formal written

objections to each and both of said decrees for other particularly specified reasons.

Nor did the honorable trial court institute any inquiry of its own, on any question of jurisdiction.

In other words, in the trial court there was neither an issue of jurisdiction, nor was there any question as to such jurisdiction in any way presented.

The record on this appeal clearly establishes, therefore, that all the parties to this suit not only recognized that the necessary diversity in citizenship was properly alleged and shown in the pleadings and proceedings in the trial court, but also that such diversity actually and in fact existed. And further, also, that the honorable trial court was fully satisfied by the pleadings, and by the proceedings and evidence in that court, that its jurisdiction was properly shown, and clearly established, and that the court's jurisdiction was not questioned or being imposed upon.

Appellees concede that, on the hearing of this suit in the District Court, complainant did not present any evidence to support his allegations in the bill as to the diversity in the citizenship of the parties, in as much as no issue thereon had been raised by defendants' answer, nor any question presented relative thereto.

Appellees, however, further respectfully submit that defendants likewise did not present any evidence to contradict such jurisdictional averments of diversity in citizenship, as they should have done had any issue thereon been raised.

Under the decision of the Supreme Court in *Hartog v. Memory,* cited and quoted *supra,* as there was no issue of jurisdiction raised by the pleadings, nor was there any independent jurisdictional inquiry made by the trial court, nor, in fact, any question as to that court's jurisdiction, any evidence in this suit, which bears on complainant's citizenship, is not, in any way, material or relevant. However, such evidence may properly be briefly referred to, as showing complainant's actual good faith in his jurisdictional averments of the bill; and also that the District Court's jurisdiction was, in no way, imposed upon.

On the hearing in this suit before the District Court, the complainant testified as follows (page numbers refer to the printed record):

"During the times covered by the bill of complaint in this action, I was a member of the bar of the state of New York (p. 92); I was coming to California first in February, 1914, *in connection with some business* (p. 96); I was retained generally to come to California and take charge of any interests which the Pacific Crude Oil Company might determine to look into or go into in this state (p. 90); I came out here on other matters (p. 96); at the annual meeting of the stockholders (of Pacific Crude Oil Company, held in Wilmington, Delaware, in 1915) I was asked if I would return to California and fight this matter through; and while I opposed first, they said they wanted me to come back (p. 96); I left here about the latter part of July (1914), and then went east to New York, etc. Q. (By Mr. Robinson) How long were you there at that time?

A. Where. *At home?* Q. Yes. (p. 99.) Q. (By Mr. Robinson) During that visit east, did you, etc. A. During the time *I was home* at that time, you say? Q. Yes. (p. 100); Q. (By Mr. Robinson) During your visit to the east between— *Mr. Martin* (interrupting): If the court please, I don't think the witness is fairly asked about his visit in the east. I don't think the question is fair because he is not testifying that he visited the east. *That is where he lives.* Mr. Robinson: Well, I think he understands what I mean. (p. 101.) I went right *back home* then (first of year 1919) to New York and Philadelphia." (p. 105.)

It may also be fairly and properly noticed that the assignment of the right of redemption, dated June 11th, 1919, on which this suit is based, and which is in evidence as plaintiff's exhibit No. 8, recites the complainant, William H. Cochran, as *"of the city and state of New York."*

In discussing such recitals, the Circuit Court of Appeals, Eighth Circuit, in

> Rucker v. Bolles, 80 Fed. 504, *held* that
>
> "The fact that a party, in executing legal instruments, described himself as a citizen of a certain state, is evidence to show that at that time he regarded himself as a citizen of the state."

D.

Appellant's Argument on the Jurisdictional Question Here Involved, Is Fallacious in that It Is Based on False Premises, a Misconstruction of the Cases Cited as Authorities, and a Misconception of the Law as to Citizenship.

Appellant's argument assumes that an issue as to jurisdiction has been raised by the pleadings in this suit.

Such, however, is not so, as has been discussed and shown, *supra*. No such issue is raised by the answer to the bill. In fact, the answer expressly admits the jurisdiction of the District Court.

Appellant also asserts that "the denial of the allegation contained in the complaint as to the diversity of citizenship," put the question of jurisdiction in issue.

But appellant points out no such specific denial. Nor can any such denial be found in defendants' answer to the bill. On the contrary, as has been already shown, the answer formally admits not only the bill's properly alleged diversity of citizenship, but also the likewise alleged jurisdiction of the District Court.

That appellant assumes that denial of complainant's properly alleged citizenship in New York, operates also as a denial of the other and distinctly separate allegation of the bill as to diversity in the citizenship of the parties to the suit, is clearly evidenced by appellant's further assertion that, on the thus claimed issue of jurisdiction, "it is incumbent upon the complainant to

prove his allegation of the complaint in reference to the said complainant being a citizen of the state of New York."

As already shown, the only issue raised by the answer, to-wit, whether complainant was or was not a citizen of New York, was an immaterial one, so long as there was no further claim and assertion of such citizenship being in the state of defendants' citizenship, that is California. Proof on an immaterial issue is never necessary; and it is doubtful if a trial court would permit any testimony thereon. In any event, it would not be pertinent to support any claim or question on which no issue has been properly made. See *Hartog v. Memory, supra.*

Appellant comments on the fact that both decrees in this suit are silent on the question of complainant's citizenship. And also contends that "There is nothing better settled than that * * * it must affirmatively appear of record that the *court determined and found* that there in fact was a diversity of citizenship."

The *only* case cited in support of this contention is *Roberts v. Lewis,* 36 L. Ed. 582. But that case is far from supporting any such doctrine. And even the quotation from the opinion in that case, which appears in appellants' brief, makes not even such a suggestion. All that was there held was that where jurisdiction depends upon the citizenship of the parties, the requisite diversity of citizenship must be alleged by the pleadings and must appear of record. But that is far from

holding that the court must formally and affirmatively determine and *find* thereon in the decree, as argued by appellant.

Appellees concede that where jurisdiction is dependent upon diversity of citizenship, such diversity must be affirmatively and properly alleged in the bill; but that if not so alleged, and yet otherwise appears in the competent evidence, that is sufficient to sustain the court's exercise of jurisdiction. This rule of law is surely so well established and recognized, as to make the citation of authorities superfluous.

Appellees, however, further respectfully submit that there is no rule requiring the court to make any "findings" thereon. See

> Liebing v. Matthews, 216 Fed. 1, 12, 132 C. C. A. 245,

where the Circuit Court of Appeals for the Eighth Circuit says:

> "There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree except where, as in *Peirsoll v. Elliott,* 6 Pet. (U. S.) 95, 8 L. Ed. 332, in the absence of a finding of facts, it would be impossible to tell what the decree in fact meant."

Moreover, in *Roberts v. Lewis,* an action at law, the *pleadings actually raised an issue as to the citizenship* of the plaintiff. And this issue was one of the questions submitted to the jury for determination. But the jury failed to make any finding thereon.

It surely cannot be seriously contended that, even if there were any rule requiring "findings" in a decree—and there is none—it would contemplate findings on immaterial issues, or on matters which were not at issue.

Appellant's brief contains the point (Point 7, A) that the "Burden of Proof was on Complainant." The *only* amplification or explanation which the brief makes of this point, is the statement that "It was incumbent upon the complainant to prove this allegation of the complaint in reference to the said complainant being a citizen of the state of New York."

Appellees have already discussed this sole issue raised by the pleadings; and have also shown that there was no necessity for any evidence thereon.

It is clearly apparent that appellant's entire argument is based on the assumption that denial of complainant's citizenship in New York, raises an issue on the separately and properly alleged diversity in the citizenship of the parties. That such assumption is not well founded, has been already shown.

While appellant's argument on the burden of proof is expressly limited to proof on this alleged New York citizenship, it is also apparent that, inferentially, appellant is also arguing that the separate allegations of the bill as to this diversity of citizenship must be affirmatively proved by complainant, on the false assumption as to the only issue raised by the pleadings.

While appellees do not consider such argument at all pertinent to the real question now under consideration,

they would refer to the two cases cited by appellant, as authority for its contention as to the burden of this proof.

The only cases thus cited by appellant, are *Roberts v. Lewis,* 36 L. Ed. 582, and *Hanchett v. Blair,* 100 Fed. 817, the latter a decision of this Honorable Appellate Court.

Appellees fully recognize that a casual reading of the opinions in these cases would create the impression that they laid down an entirely different, in fact an exactly opposite rule or doctrine as to the burden of proof, than what has been already shown by appellees to have been prescribed by the Supreme Court. A careful study of these opinions shows, however, that this is not so.

Roberts v. Lewis has been so carefully and ably distinguished by the Appellate Courts, and shown not to be in point on this question, that appellees will only cite such decisions. See

Hill v. Walker, 167 Fed. 241, 253, 92 C. C. A. 633;

Toledo Traction Co. v. Cameron, 137 Fed. 49, 53, 69 C. C. A. 28.

It would be presumptious for appellees to state just what this Honorable Court itself decided in *Hanchett v. Blair.* Appellees, however, feel justified in stating why they do not consider that case as an authority on the question here under consideration.

1. As none of the Supreme Court decisions on this point are cited in that case, it is fairly assumed that this Honorable Court did not consider this same point was before them for determination.

2. As that case—so far as appellees can find—has never been cited by the courts as an authority on this question.

3. As in that case there was a *verified answer* raising the issue of jurisdiction, the effect of which answer was determined and fixed by the then existing rules of practice in equity.

Appellant also presents certain arguments on the evidence in this suit, in connection with this jurisdictional question.

Appellees respectfully submit that, for the reasons already discussed, this evidence is not material to, nor competent in connection with the question of jurisdiction as presented for the first time in this suit, on this appeal.

However, as appellant's argument is directed to complainant's good faith in invoking the jurisdiction of the District Court, and in his allegations in the bill as to the essential jurisdictional facts, appellees will briefly answer such argument, also, however, asking this Honorable Court not to consider such answer as any impairment or waiver of what appellees have herein before already contended for.

It should be particularly noticed that *appellant's brief makes no claim that the evidence proves or estab-*

lishes complainant's residence, domicile, or citizenship in California.

Appellant talks simply of the *"inferences"* and the *"assumptions"* which it says should be drawn from the *testimony* on those questions.

Since when are such important questions as residence, domicile, and citizenship, with their ever attendant questions of personal and property rights, determinable on mere "inferences" or mere "assumptions"? It certainly is not surprising that appellant's brief fails to cite any decision, or any legal treatise in support of such an astounding contention.

Appellant has also surely overlooked the enunciations of the United States Supreme Court on this very point. *See*

> Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729,

where the Supreme Court says:

> *"It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute* or controversy *within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based,* when made distinctly to appear on the record, *create a legal certainty* of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court'."

Like language is found in

Wetmore v. Rymer, 169 U. S. 115, 42 L. Ed. 682.

The only pertinent inquiry on this question of jurisdiction is *"was complainant a citizen of California"* at the time his bill in this suit was filed?"

Appellees respectfully submit that, aside from the contrary allegations of the bill, the testimony in this suit—which is also immaterial on this question—fails to justify even an inference or an asumption that complainant was then a citizen of California. Nor that complainant had even any permanent residence or domicile in that state.

The testimony in question is confined to what was given by complainant himself.

There are certain features of that testimony, which are particularly pertinent to the question under consideration, and to which appellees would particularly direct attention. They are as follows:

Complainant was a member of the bar of the state of New York; first came to California in February, 1914, *"in connection with some business";* and as he was coming out here on other matters, the persons who subsequently organized the Pacific Crude Oil Company, also retained him, as attorney, to purchase the property involved in this suit, as he subsequently did; that he *"went home again"* in July, 1914. That complainant then certainly had no intention of returning to California, is evidenced by his testimony as to what oc-

curred after the commencement of the suit in which the judgment here involved was entered. On this complainant testified [Record, p. 96]:

"At the annual meeting of the stockholders (of Pacific Crude Oil Company) in January, 1915, *I was then asked* if I would return to California and fight this matter through; and *while I opposed first, they said they wanted me to come back, and that I should return here (California)* and do whatever I thought was best * * * so that the property would not be lost to them."

Pursuant to this retainer, and for the purpose only of the business thereof, complainant returned to California in May or June, 1915, where he remained until January, 1919 (incorrectly stated in record as 1918), when he *"went right back home."* [Record, p. 105.]

It will also be particularly noticed that whenever complainant testified about leaving California, he always likewise testified that he was *"going home."* The importance of this is particularly emphasized by the fact that while appellant's counsel invariably framed his questions about complainant's "visits to the east," complainant likewise invariably answered by asking counsel if by such question he meant complainant's "home." To which inquiry, counsel invariably answered "Yes." This point is even more particularly emphasized by the testimony which appears on page 101 of the record, as follows:

"Q. (Mr. Robinson) During your visit to the east between—

Mr. Martin: If the court please, I don't think the witness is fairly asked about his visit in the east. I

don't think the question is fair, because *he is not testifying that he visited the east. That is where he lives.*

Mr. Robinson: Well, I think he understands what I mean."

What did counsel mean? Did he mean that he recognized that there was no issue nor question of diversity of citizenship? Or did he mean that he did not want to try out any such question in the trial court, but reserve it to be sprung in the Appellate Court, if the suit should be decided against defendants?

In any event, appellees respectfully submit that there is no testimony creating an inference, let alone *"a legal certainty"* that complainant was a citizen of California, or was even *permanently* resident or domiciled therein.

> *"Mere residence may be for a transient purpose, as for business,* for a fixed period, or limited by an expected future event, upon the happening of which there is a purpose to return or remove."

> "To constitute citizenship of a state in relation to the judiciary, acts requires—First, residence within such state; and Second, *an intention that such residence shall be permanent.* In this sense, state citizenship means the same thing as domicile in its general acceptation. *The act of residence does not alone constitute the domicile of a party, but it is the fact of residence, accompanied by an intention of remaining, which constitutes domicile.* The distinction between domicile and mere residence may be shortly put as that between residence *animo manendi* and *animo revertendi."* (Cases cited.)

Marks v. Marks, 75 Fed. 321,

"A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests on the person making the allegation. To constitute a new domicile two things are indispensable:

First, residence in a new locality; and Second, the *intention to remain there. * * * Both are alike necessary, either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change."*

Mitchell v. United States, 21 Wall. 350, 353, 22 L. Ed. 584, 588.

SECOND POINT.

Defendants Having Failed to Present to the District Court Any Question of Its Jurisdiction Over This Suit, the Defendant-Appellant Is Precluded From Raising or Presenting Any Such Question, on This Appeal.

This question of jurisdiction as presented on this appeal by defendant-appellant for the first time in the cause, must also be considered from another aspect. That is, the effect and result of defendants' failure to raise such question in the trial court.

Defendants did not present any issue of jurisdiction by their answer to the bill; nor did they ever during the protracted proceedings in the suit in the trial court, even suggest, let alone claim, that there was any ques-

tion or doubt about the court's jurisdiction; nor did they ever make any motion for a dismissal of the bill, or for any order or decree, based on any want or failure of jurisdiction. The question of jurisdiction is presented for the first time in this case, on this appeal.

Appellant now presents the question by its assignments of error numbered 63, 64 and 65. The substance of 63 and 64 is that the court "had no jurisdiction," and consequently erred "in making, in rendering and in entering the final decree and interlocutory decree in this cause." Number 65 assigns error to the court's not decreeing that it had no jurisdiction on the ground that the "evidence was insufficient to show" the necessary diversity of citizenship of the parties. [Record, p. 532.]

And yet, defendants made no motion to dismiss the bill on any such grounds; nor did they at all oppose the making of either of said decrees for any such reason, although filing and arguing other formal objections thereto. [See "Specifications of Reasons," Record, pp. 368 and 489.]

Appellees contend and respectfully submit that the defendants having thus failed, during the hearing of the suit in the trial court, to raise or present any question of jurisdiction, the defendant-appellant is now precluded from raising any such question on this appeal.

In Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633, the issue of jurisdiction actually was raised under a general denial; such evidence as was adduced tended to support the allegations of the complaint as to the citi-

zenship of the parties; but no motion challenging the jurisdiction, was made in the trial court; the question of jurisdiction was first raised on the appeal.

The Circuit Court of Appeals, Eighth Circuit, in that case sustained the jurisdiction of the lower court, as the question had not been there directly raised. In its opinion, the court, on this point, says, in part, as follows:

> "Here the jurisdictional facts are properly alleged in the complaint, and there is no showing in the evidence which can create even a suspicion of fraud upon the jurisdiction of the court, and *the objection is raised in an Appellate Court by a defeated party who* presented the issue obscurely under a general denial and refrained *from directly raising the question in the trial while he speculated upon the result of the litigation.* Under such circumstances, surely, this court is not justified in reversing the judgment when there is a general finding supporting jurisdiction."

In that case, it should be noticed that an issue of jurisdiction was actually raised by the pleadings; but the question of jurisdiction was not directly raised on the trial.

In the present case, there was neither an issue on, nor a raising of the question of jurisdiction, in the trial court.

Amongst the cases decided by the Supreme Court, and which were cited as authorities by the Appellate Court in the opinion in *Hill v. Walker,* is *Hartog v.*

Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725. In discussing that case, the Circuit Court of Appeals says:

> "The case of *Hartog v. Memory* is an unqualified holding that *any lack of evidence to support the jurisdictional averments of the complaint must be challenged in the trial court, and can not be raised for the first time on appeal; and it further holds that, in order to justify a dismissal by the trial court for want of jurisdiction, the evidence material to that subject must show directly and affirmatively that there is no jurisdiction.* This case has never been overruled; nor has it been in an way qualified except as we shall presently point out. On the contrary, it has been referred to as a controlling authority as frequently as any decision of the Supreme Court dealing with the subject of jurisdiction." (Numerous cases are then cited.)

See also,

DeSobry v. Nicholson, 3 Wall. 20, 18 L. Ed. 263, where it was held that

> "*No exception* can be considered here which was not taken in the court below. Stoddard v. Chambers, 2 How. 285; McDonald v. Smalley, 1 Pet. 620."

In Livingston's Executrix v. Story, 11 Pet. 351, 368, 9 L. Ed. 746, 753,

the appellees were held to have the right to raise the question of jurisdiction, on the appeal, *but solely upon the ground that "jurisdiction was denied in the District Court, and evidence given upon the question."*

The record on this appeal shows that the suit was vigorously contested in the trial court, on every possible point of fact, of law, of equity, and of technicalities, and yet not even a suggestion of any jurisdictional question. Defendants served, filed and argued formal written "Specifications of reasons for not approving proposed interlocutory decree"; and also like specifications as to the proposed final decree. And yet not one word as to jurisdiction.

Why this silence in the trial court, if that court, in fact, was without jurisdiction over the suit? Is it not because defendants' active and able counsel well knew not only that there was no issue as to the court's jurisdiction, but also that the pleadings and the record in the suit legally established the necessary diversity in the citizenship of the parties, and the resultant jurisdiction? Otherwise, why was the want or failure of jurisdiction, which is now on this appeal claimed for the first time, not presented and claimed in the trial court? Most assuredly that was the proper place, before any decree was entered, to have lawfully, equitably, and in all fairness to that honorable court and to the opposing counsel, to have had the question, if there was any, presented and disposed of. Every other possible and impossible point and question was there raised, presented and passed upon. If defendants did not then well know that jurisdiction actually existed, and considered that there was a want or failure of jurisdiction, what was the ulterior motive that kept back the raising of this question until the case reaches this Appellate Court?

The record in this case shows that defendants have not presented one single meritorious defense, or a single claimed defense to the merits, which is not purely and simply a technical one. Is it not fair to assume that the question of jurisdiction as now for the first time raised by appellant, is but a continuation of the technical procedure pursued by defendants not only on the hearing before the trial court, but also in the proceedings before the special master? And all in the so far vain endeavor and hope to ignore the legal and equitable merits of the suit; and, through some such technicality, to defeat or at least to hinder the enforcement of the law and the equity of complainant's just claims?

An exactly similar course was commented on and severely condemned by the Circuit Court of Appeals in *Hill v. Walker,* cited, *supra,* where that Honorable Court (opinion, p. 256) says:

> "The practice here advocated simply requires that frankness toward opposing counsel and that candor towards the court which at the present time is fundamental to the procedure of all English-speaking communities. It imposes no burden except that of raising an objection directly and clearly in the court where it can be met with the least trouble to courts and the least expense to litigants. The other practice, on the contrary, authorizes clandestine pleadings and captious practice; the keeping of an objection in ambush for the purpose of speculating upon the result of the trial, and then, if that result is unfavorable, bring-

ing the objection forward for the first time in an appellate court, where it will result in the greatest loss of time to the courts themselves, and the greatest expense to the litigants, and make a mockery of justice in the judgment of all men outside of the legal profession."

As already said, the Appellate Court overruled the plea, and sustained the jurisdiction of the trial court.

THIRD POINT.

Neither the Judgment Debtor, Pacific Crude Oil Company, Nor Its Assignee, the Complainant Herein, Has Been Guilty of Laches in the Bringing of this Suit.

Appellant's brief presents the question and defense of laches in the bringing of this suit. The grounds for this claimed laches are stated as follows (brief, point 8):

"The complainant or his assignor, having for a period of sixteen months after the expiration of the period of redemption taken no steps to redeem, is precluded from maintaining this action by reason of laches."

This very same question and defense was presented to the honorable trial court, on the hearing of this suit.

The scathing opinion of the learned district judge in overruling this defense will be found at page 129 of the record. That opinion is well worthy of repetition and of consideration, before taking up the consideration and

discussion of the here renewed and repeated arguments of appellant. The learned district judge then said:

> "And what is *the defense* here to this suit? It is not the statute of limitations, but a *defense of laches. That is the only defense I see that is presented here.* And upon what is that defense founded? *It is founded upon the wrong of the defendants in failing to give the statement.* Even if the statement had been made at the time of this proceeding against the sheriff of Ventura county, it might have been said then to be the right of the plaintiff to get busy and bring suit, but *as long as the defendant was in the wrong I do not see how the defendant could complain that the plaintiff did not ask and compel it to make an accounting. Why should any man whose duty it is to make an accounting complain because somebody does not sue him? That is really the gist of the thing,. The defendant has been claiming here that the plaintiff did not sue the defendant soon enough; not soon enough by virtue of any statute of limitations, but the appeal is made to a court of equity that this action ought not to be maintained, because, forsooth, the plaintiff has not sued the defendant soon enough because the defendant had committed a wrong. Now I do not think any right ought to be founded upon a wrong, and that is what this is, in my opinion.*"

Appellant's argument is unquestionably based on the assumption—which is an absolutely incorrect interpretation of the law—that laches necessarily arises from mere lapse of time. This is clearly evidenced by

the heading or statement of the point (point 8) on this question, in appellant's brief, as fully quoted *supra*.

The versatility of appellant's arguments and contentions is most marked by its argument on this point. For while it now claims laches because of the lapse of some sixteen months between the expiration of the ordinary period for redemption, viz., twelve months, and the commencement of this suit, on its formal motion to dismiss the bill herein, and on the hearing of this suit, appellant claimed laches in complainant's delay in bringing this suit for ten months after the execution of the sheriff's deed to the real property here involved. [Record, p. 30.] And further, while its point (8) is expressly directed to the time subsequent to the expiration of the ordinary period for redemption, appellant's argument also covers the prior period.

Appellant's argument contains numerous statements about the facts in this case; of conclusions as to what facts are and are not shown by the record; and also as to the statutes and the law applicable thereto.

Appellees regret being obliged to say that such statements are most inaccurate, and are not supported by the record, nor by the law—and more particularly the statutes—applicable thereto.

I.

The Facts in the Case.

Appellant comments on Cochran's ignoring defendant-appellant's demand that he show his authority to redeem by "even, if necessary, going to Delaware and procuring a proper evidence thereof."

When it is recalled that Cochran, as attorney for Pacific Crude Oil Company, in March, 1914, had negotiated and concluded the purchase from this defendant-appellant of the very property involved in this suit; and that in all the frequent and subsequent matters and negotiations in connection therewith, up to the time of this written demand on March 1, 1918, appellant and its attorneys—who are the original solicitors of record in this suit—had always dealt with Cochran as such attorney, and had invariably recognized him to be such, the captiousness of the belated demand for proof of his authority, is manifest. As this matter will be fully discussed later in this brief, it will be now passed with the single further remark that the evidence clearly shows that this demand of proof of authority is but one of appellant's many stealthy but futile attempts to procrastinate until the twelve months within which redemption could be made, had expired.

Appellant also further states in its brief that "the evidence shows that *nothing* whatever *was done* by complainant or the judgment debtor, other than the preparation and service of said alleged demand, for the purpose of protecting or enforcing the right of redemption, until July 3, 1919, when this suit was commenced."

The testimony of Mr. Cochran—together with the exhibits marked in evidence in connection therewith—which appears on pages 122 to 125 of the record, and which was expressly admitted "to show the activities and to rebut the evidence on the question of laches," is

an unqualified contradiction of this assertion in appellant's brief.

The length of that testimony precludes its quotation in this brief. However, the salient features thereof may be briefly recited. And they are that *"shortly after the sale of the property on March 3, 1917,* I (Cochran) took up with Dr. Mills (appellant's secretary and treasurer) the question to see what could be done with the whole situation, and we discussed that for several weeks, and probably it ran into months, and there were various propositions pro and con, but we never seemed to be able to arrive at any conclusion as to what should be done."

Is all this *"nothing"* within appellant's contemplation? And does not this show expedition in an endeavor to protect the right of redemption?

What does appellant mean? Certainly no suit could then have been brought. And what better, or in fact, what other way was then open to effect redemption, than by negotiations and discussions with the purchaser, as to what should be paid to it for such redemption?

"Toward the fall of 1917," when the testimony clearly shows that Cochran realized that negotiations were futile, and that the time to redeem was fast running, *he told appellant's secretary and treasurer* (Dr. Mills) that he (Cochran) "would like to have *a statement of just what moneys they* (appellant) *had received from the property and what the expense had been so that I* (Cochran) *would know just what mon-*

eys were necessary to redeem it." (Record, p. 122.) And Cochran asked such statement not once, "but several times"; and it was likewise several times promised to him, by appellant.

It is impossible to read the unquestioned testimony of Mr. Cochran, without a full appreciation of the paltry excuses which were then being made by appellant's secretary and treasurer, for the delay in delivery of this promised statement. As treasurer, Dr. Mills had paid all the bills in connection with appellant's operation of this property. Why, therefore, could he not have made up the promised statement? Why this reference to Hornada,—another of appellant's stockholders and directors—who was in charge of the property? For no other reason than delay, as March 3, 1918, was every day coming nearer.

And can appellant properly still say that all this was *"nothing"?* And still no suit was possible. Or does appellant mean that Cochran should not have accepted of nor relied upon its secretary-treasurer's several promises of the written statement? It may also be fairly commented upon that not one of appellant's officers, directors or stockholders was called as a witness on the hearing of this suit. Cochran's testimony stands both undisputed and unquestioned.

March 3, 1918, is still nearer; and still no statement. So on January 21, 1918, and immediately after another personal interview with Dr. Mills, in which there were some vague and uncertain promises as to the delivery of the promised statement, Mr. Cochran wrote

Dr. Mills very fully on the subject, and renewed his request for a statement. This letter is in evidence as "Plaintiff's Exhibit No. 10." (Record, p. 576.) IT SPEAKS FOR ITSELF.

And what answer does Cochran receive? Nothing but a reference of the whole matter to appellant's attorney. (Plaintiff's Exhibit No. 11, Record, p. 578.)

First the matter was put up to Hornada. Now it is put up to appellant's attorney. If this Honorable Court will pardon the expression, appellant was always "passing the buck."

And then this attorney says to Cochran, "Show me your authority."

Cochran answered this captious letter by, on March 1, 1918, serving the formal written demand for a statement of rents and profits, as required by the statute.

Negotiations had failed; appellant's oft repeated promises had been likewise repeatedly broken; and no recourse was left to the judgment debtor, if it would protect its right of redemption, than to follow out the strict letter of the law.

Does not the evidence clearly show to whom and for what purpose the postponement of the institution of formal legal proceedings is really attributable? Can it be doubted that appellant purposely prolonged negotiations? Deliberately made promises which it never intended to perform? And wilfully procrastinated in every possible way, and on every possible excuse and technicality, to prolong this whole question until after March 3, 1918?

And even after appellant received the formal written demand for a statement of rents and profits, does it comply with such demand? Not at all. It ignores and refuses the demand. If appellant had given the demanded statement, appellant must have been paid the required redemption money within five days thereafter. Appellant's refusal of such demand, necessitated the bringing of this suit, which can be attributed solely to appellant's wilful and inequitable conduct. (California Code of Civil Procedure, Sec. 707.)

Appellant instituted two special proceedings in the California Superior Court of Ventura county, for a mandate requiring the sheriff of that county to execute and deliver to appellant, as purchaser at the execution sale of March 3, 1917, a deed of the real property involved in this suit. The sole other party to both these proceedings was that sheriff. The first proceeding was instituted in March, 1918, and the writ was denied by the court. The second proceeding was instituted in July, 1918; and it was pursuant to the mandate granted therein, that the sheriff executed and delivered the purported deed which had been declared void by the decree in this suit.

Appellant says that while they had knowledge of the pendency and prosecution of these proceedings, "*No attempt was made* by complainant or the judgment debtor *to intervene* in said mandate proceedings." (Referring to the first proceedings.)

If by this statement appellant means simply that neither complainant nor the judgment debtor filed any formal petition to intervene, then that is true.

But if that statement is intended to convey the impression to this Honorable Court, that neither the judgment debtor nor Cochran as trustee made "no attempt" of any kind to become parties to that proceeding, then the statement is far from true.

The evidence shows that *Cochran* as attorney for Pacific Crude Oil Company, and also as trustee, *voluntarily appeared in court on the hearing of this proceeding: and that appellant's attorney herein,* formally and forcibly *objected to Cochran's being made a party to the proceeding,* and also even to his being heard by the court. Consequently, Cochran was not heard in that proceeding, nor was he made a party thereto.

In this connection, this Honorable Court's attention is particularly asked first to Mr. Cochran's letter of March 30, 1918, to the Honorable Merle J. Rogers, the judge before whom this first mandate proceeding was heard. (Defendant's Exhibit A, Record, p. 582.) A letter written in the most unusual manner as *"amicus curiae"* in Mr. Cochran's efforts to protect this right of redemption.

Does not this letter show an "attempt," even if not strictly formal, *to intervene,* or at least to be made a party, *in that proceeding?*

The result of this letter was an adjournment of the hearing of the proceeding. Mr. Cochran's testi-

mony as to what transpired in court on that hearing, is most enlightening on appellant's attitude in any and everything in any way associated with the property involved in this suit. Mr. Cochran testified (Record, p. 118) that he was requested by the sheriff's counsel to address the court on the matter; and that he was presented to the court, for that purpose. Mr. Cochran then further testified as follows:

"I started to address the court on the matter, and *immediately Mr. Cates, who represented the petitioner, Big Sespe Oil Company, one of the attorneys here, rose and objected to my speaking or addressing the court on the ground, first of all, that neither the Pacific Crude Oil Company nor myself as trustee were parties to that proceeding. He objected to us being made parties, and he objected to us being heard at all at that time,* and Judge Rogers said, of course, if we were not parties, and Mr. Cates stood on that ground, he could not very well extend courtesies any longer, and therefore I was obliged to sit down, and Mr. Bowker (the sheriff's counsel) took the matter up from that time on."

And yet appellant says *"nothing was done"*; and that there was *"no attempt to intervene"* in this proceeding.

The courtesy and legal acumen then displayed to Cochran, certainly did not call for any or at least no further efforts from him in the second proceeding, than is shown by his letter in connection therewith, to the sheriff's counsel (Defendant's Exhibit G, Record, p. 595). And yet appellant asks why there was no attempt to intervene in the second mandate proceeding?

Appellees fully recognize the maxim quoted in appellant's brief that "Ignorance of the law is no man's excuse." But they consider that appellant's application thereof to Mr. Cochran's efforts in these mandate proceedings, is, to say nothing more, ill-founded. It is more appropriately applicable to the conduct of those proceedings by appellant's attorneys therein.

It surely is well settled doctrine that *no man is bound to intrude* himself into pending litigation, even if some of his rights or interest may be in some way involved therein.

It is also equally well settled that if one would litigate the rights or interests of another, and would have such other person bound by the judgment thereon it is *absolutely essential* that the other person should be made a party to the litigation.

In his letter to Judge Rogers, Mr. Cochran strenuously objected to the hearing of these mandate proceedings, *"without notice to the real parties in interest"* (Record p. 585).

On the hearing, appellant's attorney objected not only to Cochran's being heard, but objected *also to his being made a party* to the proceeding, claiming that he had no interest or right therein.

Appellant's forgetfulness as well as the versatility of its arguments and contentions, is again marked by the statement in appellant's brief that, *"The judgment debtor was the real party in interest, and the party most vitally concerned with the issues then pending before the Superior Court"* (the mandate proceed-

ings). And appellant then asks, why, therefore, the judgment debtor did not seek to intervene in those proceedings?

Appellees would ask, *Why did not appellant make the judgment debtor a party to those proceedings, as it concededly was "the real party in interest"?* As appellant says, "Ignorance of the law is no man's excuse."

Appellees respectfully submit that the evidence unquestionably establishes that neither the judgment debtor nor complainant has been negligent or slothful in the preservation, or in the attempt to effect this right of redemption.

The lapse of time between the service of this demand, and the commencement of this suit—so far as this question of laches is concerned—will be covered by the law which will now be considered.

II.

Mere Lapse of Time, by Itself, Does Not Constitute Laches.

That a mere lapse of time, by itself, does not constitute laches, is such a well established principle of law and equity, that it would seem almost presumptious to cite authorities in its support. But see, Bartlett v. Ambrose (C. C. A., 4th Circuit) 78 Fed. 839, where the court *held,*

> "Whether a party has lost his right to come into a court of equity does not depend upon the lapse of time, but upon the question whether,

during this time, such changes and circumstances have taken place as made it inequitable to recognize the claim of the party asserting title."

This case also cites and follows:

Alsop v. Riker, 155 U. S. 461, 39 L. Ed. 223;
Galliher v. Cadwell, 145 U. S. 368, 36 L. Ed. 738.

In Alsop v. Riker, the Supreme Court says:

"The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. *It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to these rights such,* that it would be inequitable to permit the plaintiff to now assert them."

And again in Galliher v. Cadwell, the like doctrine is laid down as follows:

"Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

These cases were also cited and followed in

Hanchett v. Blair, 100 Fed. 817,

which is a decision of this Honorable Court.

III.

There Cannot Be Any Claim of Laches in the Bringing of a Suit, When It Is Commenced Within the Time Fixed by the Statute of Limitations.

It is provided by section 707 of the California Code of Civil Procedure, that, if the purchaser shall fail or refuse to give the statement of rents and profits also demanded in accordance with the other provisions of that section, the

> "*Debtor may bring an action* in any court of competent jurisdiction, *to compel an accounting* and disclosure of such rents and profits, *and until fifteen days from and after the final determination of such action, the right of redemption is extended to such* * * * *debtor.*"

There are two important and absolutely distinct features thus provided for. *First,* the right of action for an accounting; and *second,* the extension of the ordinary period of twelve months, within which redemption may be made.

In the case at bar, the judgment debtor, in due season, made the written demand required by this section; and defendant-appellant failed to give the statement thus demanded. Consequently, the right of action for an accounting was given to complainant. And this suit accordingly was instituted. Moreover, by such refusal of this demanded statement, *complainant's time to redeem has been extended until fifteen days after the final determination of this suit.*

It assuredly cannot be seriously contended that the time thus expressly given by the statute, for redemption, can be at all abbreviated by any postponement in the bringing of the action for an accounting, so long as such action is brought within the time limited therefor by the statute of limitations.

There is no federal statute of limitations applicable to this suit. Consequently, the California statute of limitations is applicable and controlling. For, as was said by this Honorable Court in *Hanchett v. Blair,* 100 Fed. 817, at page 826:

> *"The statutes of limitation of actions, as enacted by the legislatures of the different states, are steadfastly followed by the courts of the United States as rules of decision in cases where they apply.* Bauserman v. Hunt, 147 U. S. 647, 37 L. Ed. 316; Campbell v. City of Haverhill, 155 U. S. 610, 39 L. Ed. 240. *And the rule is well settled that the laws of the former govern the plea of the statute of limitations."*

These statutes of limitations are as applicable to suits in equity, as to actions at law.

See:

Norris v. Haggin, 28 Fed. 275, 278,

which cites in its support:

Badger v. Badger, 2 Wall. 94;

Case of Broderick's Will (California case), 21 Wall. 518;

Miller v. McIntyre, 6 Pet. 66;

Piatt v. Vattier, 9 Pet. 415.

In the Norris case, which was decided by Judge Sawyer in the Circuit Court, District of California, the learned judge says:

> "Upon a full consideration of the authorities, the established rule to be deduced from them appears to be that in those states where the statutes of limitations are made applicable to suits in equity as well as to actions at law, where they embrace in terms the specific case, and in case of concurrent jurisdiction, they are, in themselves, as obligatory upon the national courts of equity, as such, as they are upon the state courts, and as they are in actions at law, and the court should act in *obedience,* rather than *upon analogy,* to them; but where they are not applicable to equity cases in the state courts, and there is not concurrent jurisdiction, or the specific case is not covered in express terms by the statute, then the statute of limitations will, ordinarily, be applied by analogy, in accordance with the provisions of the statute most nearly analogous and applicable. *In this state (California) there is a statute applicable to every case that can arise, and the statutes are as applicable to cases in equity as to cases at law, and the national courts of equity should, therefore, yield obedience and give effect to them as such.* Lord v. Morris, 18 Cal. 486; Crattan v. Wiggins, 23 Cal. 34; Hardy v. Harbin, 4 Sawy. 548. But it can make little difference which theory is adopted, as the practical result is the same whether the court acts in obedience to the statute as obligatory upon it, or adopts the statute by analogy, in pursuance of the settled principles of equity law, and the long-established rules of equity practice, equally obligatory upon the courts."

Appellant says that the California Code does not specify the particular time within which this action

for accounting should be brought. And argues that, consequently, the action "should be brought within a reasonable time."

Aside from the fact that any such construction of the statute would usually operate as a curtailing of the statutory period for redemption, the California code does prescribe a limitation for actions for accounting.

The time for the commencement of actions in California, is limited and prescribed by the Code of Civil Procedure of that state. There is no particular provision as to actions for accounting. However, by section 343 of that code it is provided as follows:

> "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

That actions for accounting are within this four-year limitation is expressly *held* in

> Alsop v. Josua Hendy Machine Works, 5 Cal. App. 228,

which also approvingly cites

> West v. Russell, 74 Cal. 545, 16 Pac. 392.

In asking denial of this plea of laches, on the grounds presented, appellees would also urge that the defense of laches is not generally of such a meritorious character, as warrants any court, either of law, or of equity, to recognize and sustain it, unless the claimed laches is clearly and unquestionably proved and established. To do otherwise, would turn its equitable purposes into inequitable injustice. The language of the

Supreme Court of California in discussing such a defense is well worthy of repetition. In

Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077,

that court says:

> "That doctrine (of laches), as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. *It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice.* It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent. * * * *but it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong.*"

Is not this language particularly pertinent to this appellant?

FOURTH POINT.

The Judgment Debtor, Pacific Crude Oil Company, Before the Expiration of the Time Allowed for the Redemption Here in Question, Duly Demanded in Writing of the Judgment Creditor and Purchaser at Said Execution Sale—the Defendant Big Sespe Oil Company—a Written and Verified Statement of the Amounts of Rents and Profits Which It Had Received From the Property in This Suit.

An intelligent presentation and understanding of this point, and of the various arguments and contentions

which may be advanced thereon by either party, require consideration of the statutes on which the statement in question is founded.

The redemption sought to be enforced in this suit, and the attendant disclosure and accounting herein, are both creatures of the statutes of the state of California. And as such statutes will be frequently cited and referred to, it seems well to here set forth the same at length, that this Honorable Court's examination thereof may be facilitated.

California Statutes Regulating Redemption.

Redemption from sales under execution, in California, are regulated by the Code of Civil Procedure of that state. The pertinent provisions of that code are as follows:

> "Sec. 702. The judgment debtor * * * may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount."

> "Sec. 707. The purchaser, from the time of the sale until redemption, * * * is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

"But *when any rents or profits have been received by the judgment creditor or purchaser* * * * *from* the property thus sold preceding such redemption, *the amounts of such rents and profits shall be a credit upon the redemption money to be paid: and if the* * * * *judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor,* * * * *a written and verified statement of the amounts of such rents and profits thus received, the* period for redemption is extended five days after such sworn statement is given by such purchaser * * * to such * * * debtor.

"If such purchaser * * * shall, for a period of one month from and after such demand, fail or refuse to give such statement, such * * * *debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits,* and until fifteen days from and after the final determination of such action, the right of redemption is extended to such * * * debtor."

The demand here in question was made pursuant to this section 707. And as the thus demanded statement was refused by the defendant, this suit was brought, *inter alia,* "to compel an accounting and disclosure," as by said section 707 is also provided for.

The sale here involved was had on March 3, 1917. This written demand having been made on March 1, 1918, was made within the "twelve months" limited for redemption (Cal. Code Civ. Pro. Sec. 702). Con-

sequently, appellant's points and arguments as to the demand, must be confined to the form and sufficiency thereof.

I.

This Written Demand for a Statement of Rents and Profits, Was the Demand of the Judgment Debtor, Pacific Crude Oil Company: and Was Properly and Legally Made.

The bill, paragraph "Twelfth" (Record, p. 13) alleges that the defendant, Big Sespe Oil Company, was duly served with and actually received such a proper written demand, in due season, to-wit, on March 1, 1918.

Defendants' answer also formally admits that a copy of this written demand "was delivered to defendant on March 1, 1918." (Record, p. 59.) And a like admission was made by defendants, on the hearing of the cause. (Record, p. 84.)

While defendants admit in their answer, the receipt on March 1, 1918, of a copy of this written demand (Record, p. 59), they likewise also deny that such demand was the act of the judgment debtor, also alleging that the same "is of no effect and void." (Record, p. 78.)

The grounds of such denial and allegation, as set forth in the answer, may be summarily stated as follows: That the judgment debtor could not acquire or convey any "legal title to any real property" within California, nor could any person transact any busi-

ness in said state, on the judgment debtor's behalf, all because that debtor had not registered in California, as a foreign corporation. And also further, that the demand "was not signed or executed by the Pacific Crude Oil Company" by any proper authority; and that William H. Cochran, who signed this demand as attorney and otherwise, for the debtor, was not authorized so to do. (Record, p. 78.)

The particularly assigned errors in connection with this demand are numbered 13, 14 and 15 (Records, p. 517.) In substance, they are (13) that the debtor did not make this demand, (14) that it was not made by or with proper authority; and (15) that it was not in due and legal form.

A.

The Signing of This Demand in the Name of the Judgment Debtor by Its Attorney, Was Sufficient; and Made Such Demand the Act of the Debtor, as Said Attorney Was Fully Authorized to Make the Same.

This written demand (Record, p. 27) was signed as follows: "Pacific Crude Oil Company, by William H. Cochran, its attorney"; "William H. Cochran as trustee for Pacific Crude Oil Company"; and "William H. Cochran."

These two latter signatures would not here receive any consideration, were it not for the comments made thereon by appellant. It will, however, suffice to say that, as the record shows, the property involved in

this suit, had been previously deeded to Cochran as trustee mentioned. And, in order to avoid any question as to whether Cochran held the legal title, as an individual or as trustee, and also to avoid any question as to the sufficiency of the signatures—because this legal title was thus outstanding—these two signatures were added to that of the judgment debtor. So we may pass to consideration of the sufficiency and authority of the signature by the attorney for the debtor.

As a general proposition, it surely cannot seriously be questioned but that corporations can act, in any matter, only through and by their duly accredited officers, agents and attorneys, in the corporate name, and on its behalf.

The unquestioned evidence shows that Cochran was a member of the bar of the state of New York, at all the times mentioned in the bill, was formally retained by Pacific Crude Oil Company, as its attorney, even before the company was actually incorporated; that he came to California for these clients in February, 1914; then negotiated with defendant-appellant, and completed the purchase from it, and for his clients, of this real property; and that during the immediately succeeding years he was in frequent personal contact and communication with defendant and its attorneys, who are the same attorneys who appeared and answered in this suit, for the defendants, and that both parties always knew, recognized and dealt with him as attorney for this judgment debtor; and more par-

ticularly, that, as such attorney, and after the execution sale of March 3, 1917, and up to the time of the making of this demand, he conducted continuous negotiations with defendant, for an adjustment of the differences between defendant and the judgment debtor. (See Cochran's testimony, Record, pp. 86 to 105, and pp. 122 to 125; also Plaintiff's Exhibits Nos. 9 and 10, Record, pp. 575, 576.)

That Cochran not only was the judgment debtor's attorney-at-law, but also was so recognized and dealt with by appellant, for some four years prior to March 1, 1918, is clearly established by the evidence.

Cochran's unquestioned testimony also shows that he was fully empowered and authorized to make this demand. That portion which appears on pages 96 and 97 of the record, is particularly pertinent. After testifying that while he was at home—in New York—in December, 1914, he was served with the summons and complaint in the action wherein the judgment under which this execution sale was had, was entered, Cochran continues:

"I immediately took the matter up with the officers and directors (of Pacific Crude Oil Company) and also at the annual meeting of the stockholders in January, 1915, and I was then asked if I would return to California and fight this matter through; and while I opposed first, *they said they wanted me to come back, and that I should return here and do whatever I thought was best not only in legal proceedings but otherwise so that the property would not be lost to them. Otherwise I had no detailed instructions as to*

how I was to carry it out, and I was to use my best judgment as to the ways and means of protecting that property against loss because of this suit, and I kept them informed from time to time by correspondence and letters, and when I returned East, I again conferred with the various officers and directors and stockholders personally, and they knew fully what I had done and approved of it in conversation; * * * I had the absolute direct approval from everyone of the officers and directors and every one of the stockholders with whom I talked."

And yet appellant would here question Cochran's authority to sign this demand as "attorney" for the judgment debtor.

The learned trial judge in his oral decision on the hearing of this suit, forcibly expressed his views on the captious attitude of the appellant in demanding proof of Cochran's authority to make this demand, and also on appellant's refusal to deliver the demanded statement (Record, p. 129), as follows:

"I cannot see any reason for the Big Sespe Oil Company demanding from him (Cochran) his authority or saying that they would give an accounting to the Pacific Crude Oil Company if proper authority was presented by Cochran in demanding it. I am inclined to think the Big Sespe Oil Company ought not to have been so technical. Their conduct in refusing that statement does not appeal to this court as being conduct in a spirit of fairness at all. However, I am thoroughly of the opinion that this demand was legally and properly made, and a statement should have been delivered. Right and justice required it, and the stat-

ute demanded it. No statement was delivered. It was the duty of the Big Sespe Oil Company to make this statement."

B.

The Legal Existence of the Judgment Debtor, Pacific Crude Oil Company, Was Not Terminated by the Forfeiture of That Company's Charter: but, on the Contrary, That Company Was Continued After Such Forfeiture, for the Term and for the Purposes Specified in the Delaware Statutes. And All the Pertinent Times and All the Pertinent Matters Involved in This Suit, Were Within Such Statutory Provisions.

In their answer to the bill of complaint, defendants attack the sufficiency of this written demand for a statement of rents and profits, for the assigned reason that it was not signed nor executed by authority of the "trustees" of Pacific Crude Oil Company; nor was it attested by the signatures of such "trustees" (Record, p. 78).

Defendants' argument in the trial court, in support of this contention, was that that company having forfeited its charter on January 28, 1918, to the state of Delaware (where it was incorporated), the company thereafter had no legal existence; that upon such forfeiture, the directors of the company became its "trustees"; and that it was only such "trustees" who could make or authorize the making of the written demand now under consideration.

Assuredly, the effect of this charter's forfeiture, as well as all other questions incident thereto, must be passed upon and determined under the laws of the state under which Pacific Crude Oil Company not only was incorporated, but also had its charter repealed, to-wit, the state of Delaware.

Such matters are provided for and regulated in Delaware, by what are there termed *"The General Corporation Laws,"* and *"The Annual Franchise Tax Law,"* of that state. Both of these laws are in evidence in this suit, as *"Plaintiff's Exhibit No. 14."* The pertinent sections of these laws have been selected and stipulated upon by counsel for the respective parties; and it is only such stipulated sections that appear in the record on this appeal. (See stipulation, Record, p. 632.)

Pursuant to section 74 of this Franchise Tax Law, this company's charter became void on January 28, 1918, for non-payment of certain taxes then due the state of Delaware. And presumably—although there is no evidence thereof—the governor of that state issued his proclamation accordingly.

That section provides that, if any corporation shall fail to pay certain specified taxes,

> "The charter of such corporation shall be void, and all powers conferred by law upon such corporation are declared inoperative and void."

There is no question but that, under this declaration of the statutes, by itself, the Pacific Crude Oil Company would have become civally dead, and would

have been shorn of all its charter powers on January 28, 1918.

A saving provision for a qualified continuance of such dissolved corporation's existence is, however, provided for by the General Corporation Laws of Delaware, as follows:

> Sec. 40. CONTINUATION OF CORPORATION AFTER DISSOLUTION, FOR PURPOSES OF SUIT, ETC.: All corporations, whether they expire by their own limitation, or are otherwise dissolved, *shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for* the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established."

In spite of this clearly specific provision that *dissolved corporations are continued* for three years after dissolution, *as "bodies corporate,"* for certain specified purposes, and with certain specified powers, defendants argued in the court below that Pacific Crude Oil Company became absolutely defunct, by the governor's proclamation, on January 28, 1918; and that its then directors became trustees for all and every of the very purposes specified in the statute just quoted.

In an attempt to support their argument, defendants cited sections 41 and 46 of the General Corporation Laws of Delaware.

By this section 41, directors of certain dissolved corporations do become the trustees thereof. But the scope of this section is specifically limited by its terms, to the *dissolution* of any corporation *under the provisions of section* 39 of the same laws, which section provides solely for the *voluntary dissolution* of a corporation, by its stockholders, through its directors. It certainly cannot be seriously claimed that either of these provisions are applicable to the dissolution of Pacific Crude Oil Company.

Section 46 will be discussed in connection with other features of the law in this case; and will likewise be shown to have no bearing on the point under consideration.

It seems appropriate to a better understanding, and the consequently better interpretation of these corporation laws, to recall that under the Common Law, when a corporation was dissolved, its real property reverted to the original grantors, its personal property was confiscated by the crown, or the state, and that all its debts, owed either to, or by it, were cancelled. And all this on the theory that, by its dissolution, the corporation was dead like a human person without any legal successors. Courts of equity, with their broad and diversified powers, did much to relieve against this abuse and confiscation of the Common Law. And later their procedure and practice gradually became a part of the legislative enactments of different states, until today there are but few states which have not fully nullified this Common Law, by

legislation looking to the due preservation and distribution of dissolved corporations' assets, for the benefit of stockholders and creditors. Naturally these state laws are far from uniform as to the details of execution, although generally for the same ends and results. And, consequently, the law of the particular state applicable to any case, alone must be considered and applied.

It also must be conceded that these remedial statutes—such as those now under discussion in the case at bar—must be strictly construed; that the provisions thereof must be strictly followed and applied; that the powers and authority given or created thereby are to be exercised only in the form and manner particularly specified; and that only such powers and authority as are thus particularly given or created, are legal, or can be exercised.

Applying these general rules of construction and application to the Corporations Laws of the state of Delaware, as cited and quoted, *supra,* it must be clearly apparent that by the above cited section 40, Pacific Crude Oil Company *was continued as a "body corporate,"* with all the attendant powers and authority of itself, its officers, and directors *(excepting for the purpose of continuing its business)* "for the term of three years" from January 28, 1918; and that its directors did not become trustees to settle its affairs.

In several of the states, directors do become trustees in such cases, and for such purposes. But it is only where and when there is a specific statute to that effect,

and which alone makes them such. A provision to that effect is found in the laws of California. See California Code of Civil Procedure, Sec. 400, as amended by Chap. 216, Stats. 1917 (p. 380). Likewise in the statutes of New Jersey, New Jersey Statutes of 1896, section 54.

There is, however, no such general provision in the Delaware laws. Consequently, in that state, the directors of a dissolved corporation, excepting in cases of voluntary dissolution, do not become trustees to wind up its affairs. And that is in perfect accord with the proviso of section 40, *supra,* which continues the corporation a "body corporate," after dissolution, for that purpose.

The Annual Franchise Tax Law, and the General Corporation Laws of the state of Delaware are each part of a legislative scheme respecting corporations; and, being in *pari materia,* should be construed together. And if the pertinent provisions of these two statutes are considered in their entirety, and in their proper relation to each other, this general scheme is very plain.

By these General Corporation Laws it is apparent that the affairs of a dissolved corporation may be wound up and settled by three different persons, or sets of persons, each depending upon the particular circumstances and conditions of the dissolution.

1. If the corporation is voluntarily dissolved under the provisions of section 39, then *by the directors, as trustees,* as provided for by section 41.

2. If the corporation is dissolved in any other way than by voluntary proceedings under section 39, than *by the corporation itself,* acting through its regular officers and directors, as provided for by section 40.

That a corporation dissolved by the governor's proclamation, for non-payment of taxes, is within the purview of section 40 of the General Corporation Laws, was held in:

Harned v. Beacon Hill Real Estate Co. (Court of Chancery of Delaware), 7 Del. Chan. 232, 80 Atl. Rep. 805.

Affirmed by Supreme Court of Delaware:
9 Del. Chan. 411, 84 Atl. Rep. 229, 233.

3. If either of these trustees in the one instance, or the company itself in the other, has not completely settled the corporate affairs within the three-year term specified in and allowed by section 40 therefor, then by a *receiver,* as provided for by section 43.

This subdivision and classification also tends to explain the section 46 of the General Corporation Laws, which provides that when the dissolution of any corporation is suggested upon the record of any action pending against it, at the time thereof, "the names of the trustees or receivers" shall be entered upon the record, and the action shall proceed against them. It must, therefore, be clear that if the company itself was defending the action, during the three-year extension term, no substitution would be necessary, and, consequently, is not provided for. After the expira-

tion of these three years, the receiver would, of course, be substituted in its place.

That the dissolved corporation, its officers and agents, may lawfully continue, even after the governor's proclamation of the forfeiture of its charter, the exercise of their former rights, powers and authority —subject only to the limitation prescribed by the above cited section 40 of the General Corporation Laws— is also clearly evidenced by the provisions of section 81 of the Delaware Annual Franchise Tax Law.

This section after particularly specifying how a charter that has thus become void, may be reinstated and restored, provides that:

> "In all cases in which the charter of any corporation * * * has become inoperative or void by proclamation of the governor * * * for non-payment of taxes, and such corporation has been reinstated and entitled to all its franchises and privileges, *such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by such corporation, its officers and agents, during the time when such charter was inoperative or void, with the same force and effect and to all intents and purposes as if said charter had at all times remained in full force and effect; and all real and personal property, rights and credits which were of said corporation at the time its charter became inoperative or void, and which were not disposed of prior to the time of such reinstatement,* shall be vested in such corporation, after such reinstatement, as fully and amply as they

were held by said corporation at and before the time its charter became inoperative or void; and *said corporation after such reinstatement shall be as exclusively liable for all contracts, acts, matters and things made, done, or performed in its name and on its behalf by its officers and agents prior to such reinstatement, as if its charter had at all times remained in full force and effect.*"

Can there be any doubt but that this section was intended to cover the acts of the dissolved "corporation, its officers and agents" during the three year extension of its corporate existence?

This construction of the Delaware laws is also fully recognized in Harned v. Beacon Hill Real Estate Company, cited *supra,* where the Court of Chancery *held* that

> "By section 40 the corporate existence is extended for three years from the time of voluntary dissolution for winding up the affairs of the company. After three years the officers of the company have no power to continue further their winding up duties."

And in discussing the power of the Court of Chancery, under section 43 of the General Corporation Laws, to appoint a receiver for a dissolved corporation, after the expiration of this three years, "to take charge of the unfinished business and undisposed assets of the company," this same opinion says:

> "The statute does not indicate the form of the application, but presumably it is intended that the

forms and procedure in equity cases shall be used so far as practicable * * *. In every suit there must be parties, and *the corporation, though paralyzed, is still a proper party, and its officers may answer for it in that suit.*"

The Delaware Supreme Court, on the appeal of this case, says:

"But one question raised is 'whether the company could be made party defendant in the proceedings instituted below for the appointment of a receiver'."

And after quoting this section 40, in full, continues:

"We fail to see that section 46 of the Corporation Act is at all pertinent to the question before us, because its sole purpose is to provide that a suit begun against a corporation before dissolution, shall not abate on account of the dissolution," etc.

"That section (40) provides for the continuance of the corporation for three years after dissolution in order *that the company itself* may settle and close is business. Such settlement would be entirely voluntary with the company. * * * The procedure that is not only usually, but invariably, followed in such court is the one that was adopted in the present case. A bill of complaint was filed, and necessarily there had to be a defendant in the action. *Who should be named as defendant? Manifestly there could be none other than the Beacon Hill Real Estate Company, the dissolved corporation. If such corporation could not be made party defendant, then there could be no defendant named.* * * * In that way only would the company be

apprised of the fact that application had been made to the court for the appointment of a receiver to sell its property."

Do not all these expressions of the law clearly show the company's continued actual existence under section 40? And that the directors do not become trustees? In that case, the company, as such, was sued, and answered through its proper and usual officers.

Analogous provisions of the statutes of states other than Delaware, have also been similarly construed.

Harris-Woodbury Lumber Co. v. Coffin (C. C., W. D. Nor. Carolina), 179 Fed. 257, 263, construing the statutes of New Jersey.

Hanan v. Sage (C. C. Minn.), 58 Fed. 651.

Olmstead v. Distilling & Cattle Feeding Co. (C. C. Illinois), 73 Fed. 44;

Boyd v. Hankinson (C. C. A. 4th Circuit), 92 Fed. 49, construing the statutes of New Jersey.

In Hanan v. Sage the court says:

"*The Corporation,* under this statute, *did not cease to exist* after the decree of the Supreme Court (forfeiting charter), *but continued its organization and retained its officers and directors, and its stockholders continued to be such, with all the authority possessed before.* True, the corporation only existed for the purpose of winding up its corporate business, and closing up its concerns; but to do this it had full control over all its property, and could dispose of it for the purposes indi-

cated in the statute. * * * The statute is clear in its terms, and, unless the act done by the corporation before the three years expired is clearly for some purpose other than that pointed out, or is fraudulent, there is no reason why the conveyance to the defendant should be declared void."

And like construction was made in the *Olmstead* case:

> *"I do not think,* as was argued here, *that the directors of said corporation became trustees.* It seems to me that, within the sense of the statute, *the corporation itself became a trustee* as soon as the judgment of ouster was rendered. * * * Here, *by our statute, the corporation itself,* when the judgment of ouster was rendered, *became the trustee, for the purpose of converting and dividing its property among* the persons who were entitled to receive the same."

C.

Pacific Crude Oil Company's Retaining of Cochran as Its Attorney, Was Not Within the Statute of Frauds. Nor Was the Written Demand on Defendant-Appellant for a Statement of Rents and Profits, at All Affected by that Statute.

Appellant's brief presents but one point of argument (point 3) against the sufficiency of this written demand on defendant-appellant, for a statement of rents and profits.

The substance of that argument is that Coochran's retainer as attorney, by Pacific Crude Oil Company,

is within the statute of frauds; and not being in writing, is void. And further that, consequently, Cochran's acts as such attorney, under such retainer, were unauthorized. It also being more particularly contended that "the agreement of employment of William H. Cochran by the Pacific Crude Oil Company covered the period of five years, and not being in writing as required by section 1624 C. C., was utterly void. William H. Cochran therefore had no right to make the demand in writing as attorney of the judgment debtor."

Appellant's argument shows that appellant either has failed to appreciate the objects and purposes of this statute, or that it has deliberately ignored the same. For, as was said in

> Colon v. Tosetti, 14 Cal. App. 693, 113 Pac. 365, 366,
>
> "The statute of frauds is for the prevention, *not in aid of the perpetration, of fraud. It is to be used as a shield, not as a sword.*"

Appellant argues that because Cochran, under this retainer, was occupied for several years in his work as attorney for the judgment debtor, Pacific Crude Oil Company, *this fact* brings his contract of employment within the statute of frauds.

Appellant again fails to appreciate the very terms of the statute on which it relies, and which it quotes in its brief; and appellant likewise incorrectly reads its own cited authorities.

Section 1624 of the California Civil Code—which is cited and relied on by appellant—clearly and in express

words covers *only* an agreement that *"by its terms"* is not to be performed within a year.

The only evidence as to Mr. Cochran's retainer as attorney for Pacific Crude Oil Company, is in his own testimony on that subject, appellant is again in error in its quotation of Mr. Cochran's testimony on that subject, so far as such testimony is pertinent to this demand for a statement of rents and profits.

The testimony as quoted by appellant is strictly limited to Mr. Cochran's first coming to California in February, 1914. He returned home in July, 1914. And after the commencement of the suit in which the judgment here involved was entered, and in January, 1915, he was again retained as attorney by Pacific Crude Oil Company, to protect its interest. Mr. Cochran's testimony as to this particular retainer, appears on page 96 of the record, as follows:

"I was asked if I would return to California and fight this matter through; and while I opposed first, they (the stockholders of Pacific Crude Oil Company) said they wanted me to come back, and that I should return here (California) and do whatever I thought was best not only in legal proceedings but otherwise so that the property would not be lost to them."

Is there anything in any part of Cochran's testimony to indicate, or upon which any fair assumption can be legally founded, that either of the parties to this retainer *then* thought or contemplated that the legal services which Cochran was *then* retained to perform and carry out, would cover the period of time which subse-

quent developments—and more particularly the actions of this defendant-appellant—required should be given to them? Certainly the *"terms"* of this retainer do not indicate or show any such thought or contemplation; or that, in fact, such legal services could not and would not "be performed within a year from the making" of such retainer; or that Cochran was then retained for any specific term which assuredly was for longer than a year.

It is doubtful if defendants' solicitors in this suit have any written retainer from their clients. This suit has now been pending for considerably more than a year. Will those solicitors admit to their clients, that their retainer is within the statute of frauds, and that, consequently, they have no right of recovery for their legal services herein?

The question is not as to the length or period of time actually occupied in the performance of the agreement. The real and the only question is *"do the 'terms' of the agreement by themselves show that the agreement was not to be performed within a year?"*

The decisions of the California courts on the cited provisions of the California Civil Code brook no discussion on that question. See:

Stewart v. Smith, 6 Cal. App, 152, 91 Pac. 667, 670;

Hellings v. Wright, 29 Cal. App. 649, 156 Pa. 365;

McKeany v. Black, 117 Cal. 592, 49 Pac. 710;

Dougherty v. Rosenberg, 62 Cal. 37.

In *Stewart v. Smith,* the California Court of Appeals says:

> "It is sufficient to say that the contract in question is not 'an agreement that by *its terms* is not to be performed within a year from the making thereof.' It is said in *McKeany v. Black,* 117 Cal. 592, 49 Pac. 710, 'if the contract *by its terms* is not to be performed within a year it is void, but *if it may by its terms be performed within a year, it is not, even though it may not be performed within that time.*' To the same effect are Dougherty v. Rosenberg, 62 Cal. 37, and Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 721."

The only quoted citation in appellant's brief—from Chitty on Contracts—is in no way in conflict with the doctrine laid down in these decisions. On the contrary, it is in perfect accord with them; and absolutely fails to support appellant's argument and contention.

Moreover, the parol agreement having been entirely executed, is not within the statute of frauds.

Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265;

McCarthy v. Pope, 52 Cal. 561.

Defendant-appellant also waived any possible defense of the statute of frauds, by failing to object on such ground, to the parol evidence relative to the retainer in question, when such evidence was offered and given.

Nunez v. Morgan, 77 Cal. 427, 433, 19 Pac. 753, 755.

And again, no mere "intruder"—as is this defendant-appellant—"can invoke the aid of the statute of frauds."

Stewart v. Smith, 91 Pac. 667, 670.

Assuredly this Honorable Court will not permit appellant to turn into a "sword" what was intended to be used as a "shield" against fraud.

FIFTH POINT.

The Assignment by the Judgment Debtor, Pacific Crude Oil Company, to Complainant, of the Right of Redemption Here Involved, Was Made With Due Authority: Was Sufficient to Transfer to Complainant Such Right of Redemption: and Complainant Thereby Became Entitled to Make the Same.

By a certain instrument in writing, dated June 11, 1919, the judgment debtor, Pacific Crude Oil Company, assigned to complainant, for an expressed valuable consideration, the redemption and the right of redemption involved in this suit. (Plaintiff's exhibit No. 8, record p. 569.)

Appellant questions and attacks this assignment upon three separate and different grounds; First: That it was not legally executed and the Pacific Crude Oil Company was not bound thereby. (Appellant's brief, point 6.); Second: That it is invalid by reason of the fiduciary relationship existing between the parties thereto (Appellant's brief, point 5.); And third: That it

does not entitle complainant to make this redemption unless he has an interest in the whole or some part of the property. (Appellant's brief, point 4.)

I.

This Assignment Was Prima Facie Evidence; the Burden of Disproving It, and of Showing Any Invalidity, Was on Defendants; and the Assignment Was Properly Admitted in Evidence.

Appellants' whole argument under point 6 of its brief, is devoted to an elaborate discussion of the powers and authorities of officers of a corporation in general; and more particularly as to the powers and authority of the officers of this judgment debtor under the statutes of the state of Delaware.

But in the intensity of its argument on the question of the general powers and authority of corporate officers, *appellant,* unfortunately, *has overlooked or lost sight of the fact that such question is not at all here involved.*

The sole question here is, "was this assignment properly admitted in evidence?" And on that question, the powers of the judgment debtor's officers to execute the assignment, is of no possible material interest or concern.

The question of the propriety of the Honorable District Judge's admission of this original assignment as evidence in this suit, is controlled by the statutes of California relative to such evidence.

Section 1951 of the California Code of Civil Procedure provides, in part, as follows:

> *"Every instrument* conveying or *affecting real property, acknowledged* or proved and certified, *as provided in the Civil Code, may, together with the certificate of acknowledgment* or proof, *be read in evidence in an action* or proceeding, *without further proof."*

The provisions of the Civil Code to which reference is thus made, are found in S. 1189 thereof. The pertinent part thereof is as follows:

> "Provided, however, that *any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state;* and provided *further, that the certificate of the clerk of a court of record* of the county or district *where such acknowledgment is taken,* that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and *that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be prima facie evidence of the facts stated in the certificate of said clerk."*

The certificate which is a part of this assignment, not only accurately follows, but also completely complies with these several requirements of the Civil Code. (Record, p. 574.)

Consequently, this assignment, together with the accompanying certificate as to the acknowledgment there-

of, were properly received in evidence by the honorable trial court, under the just quoted provisions of S. 1951 of the California Code of Civil Procedure.

It may properly here be noticed that while at first the learned District Judge admitted in evidence only the assignment (Record, pp. 98, 99), later the "whole paper," including the certificate of acknowledgment, was admitted in evidence on the court's own declaration to that effect; and that that was done without any objection or exception by defendants. (Record, p. 125.)

II.

The Delaware Statutes Do Not Affect this Rule of Evidence.

Appellant presents some argument—which on its very face shows appellants' own lack of faith and confidence therein—as to the powers and authority of Pacific Crude Oil Company's officers to execute this assignment, in view of the forfeiture of that company's charter. And certain provisions of the Delaware statutes are cited in an effort to bolster up this very weak and shaky argument.

It has been already shown, *supra,* that there is no question of the powers of the judgment debtor's officers properly before this Honorable Court for review. The sole question now under consideration, is purely and solely one of evidence. And on that question the cited Delaware statutes have no bearing.

However, these Delaware statutes have been already fully presented and discussed by appellees (fourth point

B). And it has been unquestionably shown and established that, in spite of the forfeiture of its charter, Pacific Crude Oil Company's corporate existence was continued for all the purposes and matters involved in this suit; and that the company likewise retained its officers and directors with all the respective attendant powers and authority as before the forfeiture was had.

III.

No Question as to the Validity of this Assignment Is at Issue in this Suit, Nor Can Its Validity Be Questioned Herein.

Appellant asserts that this assignment *is invalid* by reason of the fiduciary relations between the parties thereto. (Appellant's brief, point 5.)

If such were the law, it certainly would be a new and most startling doctrine. No wonder appellant's brief is so silently silent on authorities to support the assertion. If such were the law, no trustee could ever deal with the *cestui que trust,* as to the trust estate. Nor vice versa.

All the authorities cited by appellant, go simply to the proof of good faith and the sufficiency of the consideration, *if and when the transaction and the consideration therefor is questioned by the beneficiary himself.*

It certainly is a most startling, preposterous, and absurd claim that a third party, a mere intruder, can collaterally question the validity of transactions between a trustee and a *cestue que trust;* or collaterally inquire

into the sufficiency of the consideration for such transactions. Or that on the mere unfounded insinuations of such an intruder, a party would be bound to prove the validity of his transaction and the sufficiency of its consideration.

There is one statement in appellant's brief that is not only unqualifiedly false and unfounded, but which also ill becomes appellant's brief on this appeal. And that is the statement that "the undisputed evidence discloses that the consideration for the assignment was not only inadequate but tended to operate as fraud upon the stockholders of the Pacific Crude Oil Company." While, as already said, no such question can be properly raised on this appeal, this statement should not be left unanswered, or appellees might be considered as admitting its truthfulness.

There is not a suggestion, let alone any evidence, of the value of the property in controversy.

The evidence clearly shows what complainant gave or paid for this right to redeem. (Record, p. 90.) And that Pacific Crude Oil Company, who assigned the redemption right, was then without any money, so that it could itself make this redemption, or even pay complainant for his years of legal services. (Record, p. 97.) And Cochran gave a general release to the company and all its stockholders.

Nor is there any warrant from the evidence, for any conclusion that this assignment was not authorized by the largest amount of the outstanding company's stock, as, in fact, it actually was.

This ill-founded and untrue statement should have found no place in a brief before this Honorable Court. It is the more marked as coming on behalf of one who not only has endeavored to unlawfully seize and retain this property for itself without any consideration, but who has also ignored and violated every rule and principle of justice, fairness, law and equity, as repeatedly found by the honorable trial judge, and also by the special master herein.

This Honorable Court's indulgence and pardon is asked for this transgression.

IV.

The Right and Power to Enforce the Redemption Assigned to Complainant, Is Not Dependent Upon Claimant's Also Having an Interest in the Whole or Any Part of the Property. But, in Any Event, Complainant Has Such an Interest.

Appellant argues (Appellant's Brief, Point 4) that as the California Statute (Code of Civil Procedure, Sec. 701) provides for redemption by "The judgment debtor, or his successor in interest, in the whole or any part of the property," the debtor cannot, "Independent of a transfer of some interest in the property, clothe a stranger as assignee with the right of redemption which is given only to him personally or to his successor in interest in the whole or part of the property."

Appellees respectfully submit that the right of redemption is a purely personal right, which follows the person and not the land. And that, consequently, ownership of neither the property nor even of any interest therein, is essential to the exercise and enforcement of such right. And further that such right is assignable, and is enforceable by the assignee thereof, regardless of any ownership of the property.

Appellees further respectfully submit that, in any event, complainant has such an interest in the property.

Before proceeding with the argument on these contentions, appellees would direct attention to the assignment of this right of redemption. (Plaintiff's Exhibit No. 8, Record, p. 569.) This instrument, in the necessary and proper language, transfers to complainant,

"All and every right, title, interest, benefit and advantage under and because of the said right of redemption; and also every power and authority in connection therewith ,including any and all rights of action and proceedings to make and enforce such redemption. It being the intent and purpose of the said Pacific Crude Oil Company, by this instrument, to absolutely and fully assign and transfer unto the said William H. Cochran, not alone its aforementioned certain right of redemption, but also every right, power and authority, either at law, or in equity, in any way connected therewith so that the said William H. Cochran may as fully and completely make and enforce such redemption as this company might, and could do, if this sale and assignment had not been made, and as if this company was personally present."

A.

The Judgment Debtor's Right to Redeem Is Not Dependent Upon Any Ownership of the Property. Such Right Is Assignable; and May Be Enforced by the Assignee Thereof, Regardless of Any Interest in the Property.

The statute unqualifiedly gives the "judgment debtor" the right to redeem. Such right is given without any qualification or limitation whatsoever.

That the judgment debtor may make redemption even if he has transferred his interests in the property to be redeemed, *or even if he never had any interest therein,* has been repeatedly held by the courts.

The generally well recognized rule on this question is stated in 17 Cyc. at page 1327, as follows:

> "The *statutes* giving the judgment debtor the right to redemption *do not make the actual ownership at the time of sale or redemption a condition precedent, the right following the person and not the land,* and continuing for the period prescribed by the statute, *although the debtor meanwhile may have parted with his title.*"

And numerous cases are cited as authorities for this text. For the California authorities there cited, see:

So. Calif. Lumber Co. v. McDowell, 105 Cal. 99, 38 Pac. 627;

Yoakum v. Bower, 51 Cal. 539.

The case of *So. Calif. Lumber Co. v. McDowell* is of particular interest in that the judgment debtor never had had any title to or even any interest in a certain part of the property sold at the execution sale; and yet he was held to be entitled to make its redemption.

Yoakum v. Bower holds that even if the judgment debtor has parted with his interests in the property sold under execution, he still retains his right of redemption thereof, a like right being also given to the purchaser or successor to such interests. In its opinion in that case, the Supreme Court of California says:

> *"A defendant in execution can redeem* from an execution sale, notwithstanding he has conveyed to another the property sold under execution. The Code of Civil Procedure, section 701, provides in terms that property sold subject to redemption may be redeemed by the judgment debtor or his successor in interest in the whole, or any part of the property. *The successor in interest may redeem, but the judgment debtor may also do so.* The statute provides that the judgment debtor, as such, may redeem; not that he may redeem only, and in the event, that he has no successor in interest in the property sold under execution. *There is no good reason why the statute, which is remedial in its character, should receive a narrow construction,* in order to defeat the right of redemption which it intended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and *a variety of other cases might readily*

be imagined, in which the judgment debtor, even though he had sold the property, would still have an interest in effecting a redemption from the execution sale."

Moreover, if it were requisite that with an assignment of the right of redemption, there should also be a conveyance of some interest in the property itself, then the right would not be personal, but would necessarily be running with the land. And that is not the character of the right of redemption, as has been already shown.

It thus is clearly apparent that—in so far at least as the judgment debtor is concerned—the right of redemption is a right given to the judgment debtor, as such; and that as it does not "run with the land," the successor in interest in the property would not have any right of redemption thereof, except for this specific provision of the statute that gives him an equal right of redemption with the judgment debtor.

It being established that the judgment debtor has a personal right of redemption independent of the ownership of the property to be redeemed, the questions arise: Can this mere right of redemption be assigned by the judgment debtor? And can it be enforced by the assignee thereof?

The general rule as to the assignability of such right, is stated in 17 Cyc. at page 1329, to be as follows:

"The general rule is that the statutory right to redeem property sold at an execution sale is

assignable, and the assignee succeeds to all the right and interest of his assignor."

It becomes pertinent to consider at least the legal, if not also the equitable nature and character of the right of redemption as thus given by the statute. The legal nature and character is specifically defined and prescribed by the California Civil Code.

Section 655 of that Code provides, in part, that,

*"There may be ownership of * * * rights created or granted by statute."*

As this statutory right of redemption is surely within this provision, the judgment debtor likewise assuredly has *"ownership"* of such right.

The code further provides by section 654, as follows:

"In this code, the thing of which there may be ownership is called property."

Under these two cited provisions of the code, the judgment debtor not only assuredly has *"ownership"* of this right of redemption, but such right is also *"property."*

Absolute ownership of property is also defined by section 679 of the Civil Code in the following language:

"The ownership of property is absolute when a single person has the absolute dominion over it, and *may use it or dispose of it according to his pleasure, subject only to general laws."*

The statute which gives this right of redemption to the judgment debtor, makes no qualification or limita-

tion of his *absolute ownership* thereof. Nor does it place any limitation on his right to *"dispose of it according to his pleasure."* Nor is there any such qualification or limitation created by any "General" or other laws.

As the judgment debtor had the absolute ownership of this right of redemption, it also had the right to "dispose of it according to his pleasure."

Appellant concedes in its argument that the judgment debtor had the right to assign this right of redemption; but contends that such assignment is not capable of enforcement without the assignment of some further and attendant rights in the property itself.

To sustain such a contention would be a mockery. It would be to say that a "right" may be assigned, but not the assignor's remedy of enforcing the same. It would be to say that while one may dispose of his property "according to his pleasure," he cannot transfer his rights of enforcement in connection therewith. It would be to say that the assignee must have interests in the property, which are not requisite to the assignor's right to redeem. It would be a transfer of a mere shell, without any kernel. In other words, such "property" would be valueless and incapable of realization, unless retained by the judgment debtor himself. And the provision of the statute that he may "dispose of it according to his pleasure" is valueless, and but a travesty.

B.

Complainant Had an Interest in the Property.

Appellant further argues that the assignment in question does not entitle complainant to make this redemption, "unless he has an interest in the whole of the property or some part thereof."

The record on this appeal indisputably establishes that the *legal title to the property involved in this suit, was in William H. Cochran, the complainant in this suit;* and that, at the time of the execution sale of March 3, 1917, he was in undisputed possession and occupation of that property by virtue of such legal title.

In this connection, the opinion of the Honorable Trial Judge on the hearing of this suit, is particularly pertinent, when he not only holds that complainant had the "right to redeem," but also that "it was his (Cochran's) duty to redeem." (Record, p. 128.)

The purposes for which Cochran held this legal title, certainly are of no material concern. The important fact is that Cochran held and owned the legal title to this property.

Can it be doubted but that complainant's holding and ownership of the legal title to this property, was sufficient "interest in the property" as to satisfy even this argument of appellant?

SIXTH POINT.

Appellant, as Purchaser at the Execution Sale, Acquired No Right of Possession of the Property Then Sold. Nor Could Said Purchaser Lawfully Take Such Possession until After the Expiration of the Period Within Which Redemption from Said Sale Could Be Made. Consequently, Appellant Was a Trespasser on the Real Property Involved in this Suit.

The elaborate argument in appellant's brief on express and resultant trusts may be interesting, but it is not important nor relevant to the real question involved on this appeal and which appellant has endeavored to camouflage with immaterial law and authorities.

It is not questioned but that, at the execution sale of March 3, 1917, all the then existing interests of Pacific Crude Oil Company in the property involved in this suit were sold to appellant.

But it does not seem important to now exactly define and fix what those interests were. That the judgment debtor then had some such interests is conceded. And even if the finding in the "sixth" paragraph of the interlocutory decree, by which such interests are adjudged, is erroneous—as now claimed by appellant, but to which no error has been assigned—this Honorable Court is not bound to adopt or follow such finding; nor can this final decree be reversed because of any erroneous finding—even if there be one—provided, of course,

that the conclusions of the decree are otherwise well founded.

The important and *the only question* (on this point) which goes to the merits of the decrees in this suit, *is, what are the rights acquired by appellant as purchaser* at the execution sale of the then existing rights and interests of Pacific Crude Oil Company in the real property involved in this suit? It is not a question of what rights or interests of the judgment debtor were sold. *The sole question is as to the rights of the purchaser in connection with whatever was sold.*

Appellant's whole argument is devoted to obscuring the only important and the real question, in the hope of offsetting and upsetting one of the fundamental principles and rules of law and equity on which the master's report and the decrees herein are founded, to-wit, *"that appellant was a willful trespasser* on the property involved in this suit."

It is conceded by appellant that, at the time of the execution sale, Mr. Cochran was the holder and owner of the legal title to this property; and that he was then also in actual possession, occupation and operation of the property. In fact as well as at law, Cochran as the holder and owner of the legal title, was the only person entitled to such possession. Pacific Crude Oil Company had no right of possession. At the most it had the right to obtain such possession, but only in a lawful and proper manner.

Appellant's sole conclusion and contention on its argument is stated by appellant to be that Cochran is

"charged with the obligation to convey the land to the Pacific Crude Oil Company at the latter's demand. This obligation was enforceable in equity."

Speaking generally, this is a fair statement of the law. But appellees would further say that such conveyance would be made only when and after the trustee's rights and interests in connection with the trust property had been fully provided for. In other words, the claimed right to a conveyance would not necessarily be an absolute right free of any and all conditions.

In this case, Pacific Crude Oil Company never made any demand on Cochran to convey this property, nor did it ever bring any action to compel such conveyance.

A.

The Purchaser at an Execution Sale Acquires Only an Equitable Estate in the Property Sold, With the Right to Receive the Rents Therefrom, or the Value of the Use and Occupation Thereof. And the Judgment Debtor Is Entitled to the Possession Until the Time for Redemption from the Sale Has Expired. Consequently, Big Sespe Oil Company, by Taking Possession of the Property in Suit, Was a Trespasser Thereon.

The only pertinent statutory provision as to the rights of a purchaser at an execution sale, in connection with the property thus sold, is found in section 707 of the California Code of Civil Procedure, which, in part, provides that

> "The *purchaser, from the time of the sale until a redemption, * * * is entitled to receive,* from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof."

Aside from this statute, the respective rights of the owner and of the purchaser, in connection with the sold property, between the times of the sale and of the expiration of the redemption period, have also been repeatedly and uniformly laid down by the decisions of the Supreme Court of California. See:

Page v. Rogers, 31 Cal. 293;
Walker v. McCusker, 71 Cal. 596;
Purser v. Cady, 120 Cal. 214, 218, 52 Pac. 489.

The substance of these decisions is that:

The purchaser acquires only an *equitable estate in the property sold until the time for redemption has expired; and that the judgment debtor,* or his successor in interest in the property, *is entitled to its possession, until the time for redemption has expired,* assuming, of course, that he had previously had such possession.

Thus, the *purchaser is entitled not to possession of the sold property,* but, under the statute, only to receive the agreed "rents" thereof from the "tenant in possession," if there be one; or "the value of the use and occupation thereof," should the owner himself remain in possession and use of the property. In such latter case the owner is considered to be, and held liable to the purchaser as a "tenant in possession."

Harris v. Reynolds, 13 Cal. 515.

Even the case of *Pollard v. Harlow,* 138 Cal. 390, 392, 71 Pac. 454, which is cited in point 2 of appellant's brief as an authority, reiterates and reaffirms this doctrine. The opinion in that case speaks of the rights acquired by the sale, and says that they were *"subject to be defeated* by a redemption * * *, and to the *right of the judgment debtors to remain in the possession of the land until the execution of the sheriff's deed."*

In fact, appellant also expressly admits this to be the true doctrine, for after asserting what it claims to have acquired by the sale, its brief says that their rights were subject to the "right of the judgment debtor to the possession of the property during the period allowed for redemption."

In these just cited cases the judgment debtor was the legal owner of the lands which actually were sold, and was in actual possession thereof. And although the lands themselves were sold, the purchaser acquired no right to their possession, such possession remaining as before.

In the case at bar, the judgment debtor was not in possession of the property here involved. Nor did it have any right of possession thereof. At the most, it had simply the right to obtain possession under lawful conditions, and in a lawful and proper manner. Even if appellant's argument be adopted, Pacific Crude Oil Company had but an equitable estate which had not been reduced to possession.

Moreover, by the interlocutory decree, paragraph "eighth," it was decreed that the "Purchaser, Big Sespe Oil Company, was not entitled to such possession or occupation of the said real property." And to this appellant failed to assign any error.

As appellant had no right to possession, its unlawful possession of this property was a trespass thereon.

Appellant's paltry excuses and pleas of justification for its conceded trespass are farcical. The law recognizes no excuses for the commission of an unlawful act.

Appellant says that "possession was taken solely for the purpose of operating and caring for said property." And asks, inasmuch as it was entitled to the rents from the property, "How can it be said that complainant or the judgment debtor was in any wise injured by the possession of appellant?"

The "care" which appellant so considerately gave to this property, and the injury which appellant attempted, are fully set up in its account herein. The opinion of the special master (Record, p. 399), which accompanied his report, is, for the moment, probably a sufficient answer and denunciation of appellant's solicitous interest and inquiry. But more of this subject anon.

SEVENTH POINT.

Big Sespe Oil Company Is Not the Owner of the Property Inventoried in Schedule "E".

A.

Appellant claims to be the owner of all the machinery, equipment, buildings and structures which are on the real property involved in this suit, and also even such as are sunk therein. All these are particularly itemized in schedule "E" of defendant's account before the master. Appellant bases its claim of such ownership on a certain "Certificate of Sale" from the sheriff of Ventura county, state of California. (Defendant's exhibit "B" before master, record, p. 628.)

Because of this alleged ownership, defendant also asserts in its account that it is entitled on this accounting, to a credit equal to 7% per annum on the "estimated value" of all this property as inventoried and appraised in schedule "E," as compensation for the use thereof in connection with the operation of this realty.

Appellees contend that appellant did not acquire any such ownership or title by said sheriff's sale; and that consequently this claimed credit for interest should not be allowed.

On February 17, 1917, the sheriff of Ventura county, California, acting under the same writ of execution and the same judgment as are involved in the execution sale of the realty herein, undertook to sell the *"personal property" of the judgment debtor, Pacific Crude Oil*

Company. According even to the very terms and provisions of this "Certificate of Sale," which was given to Big Sespe Oil Company after such sale, the said sheriff then sold *only "all the right, title and interest" of the said Pacific Crude Oil Company,* of, in and to the property in the said certificate particularly mentioned, which property was then and there on and in this reality, and which is also practically the same as appellant now claims to own.

By the two deeds of March 30, 1914, which are in evidence (plaintiff's exhibits 5 and 6, Record, pp. 557-568) there was sold and conveyed unto "William H. Cochran as trustee for Pacific Crude Oil Company," not only the real property involved in this suit, but also all the personal property and effects then and there thereon. Such personal property is more particularly described in the "Schedule of Personal Property" which is made a part of each of said deeds. And it has been established in these proceedings that all the personal property as was thus sold and conveyed includes what is here claimed by appellant.

As appellant has always conceded, and as it also has been decreed that, by virtue of these two deeds, Mr. Cochran acquired the legal title to the realty, can it be seriously questioned that he did not also likewise acquire the legal ownership of the personal property on that realty?

Consequently, all that was and in fact all that could have been sold at the sale in question was the Pacific Crude Oil Company's right to enforce the trust in con-

nection therewith, against the trustee. And, at the most, the purchaser at that sale acquired no greater right or interest than this, in that personal property.

The personal property was not sold. Therefore, Big Sespe Oil Company did not purchase it. Nor is that company the owner of that property.

There is, therefore, no legal foundation for the claimed credit of interest on the estimated value of such property; and that, in no event, would that item of the account be allowable.

Appellees also further submit that, in any event, and under the particular circumstances of this case, appellant would not be entitled to compensation for the use of this property, on the basis of its "estimated value," but solely on the basis of *defendant's actual investment* therein, *that is to say, on the $300 which defendant paid at the execution sale of February 17, 1917.*

Appellant claims to have bought all this property for $300; and yet also claims that, when bought, it was worth some $18,000. And then asks compensation for its use, on the basis of the latter valuation. Would an allowance on such a basis be equitable? *"He who comes into equity must do so with clean hands."*

Does not this vast difference in these figures also conclusively show that *appellant did not buy this property, but that it bought only the right of the judgment debtor to enforce the trust in connection therewith?* Is it possible even at a fairly and properly advertised and conducted sheriff's sale, *to buy for only $300 what is said to be worth $18,000. Mirabile dictu.*

Moreover, if appellant acquired this property on February 17, 1917, as it asserts it did, did it take the property away from the realty, that is "down the hill and back again"? It did not, but left it just where and as it was. And yet appellant also asserts that the cost of merely bringing such property up on to the realty would be a considerable one; and that such an item of expense is included in its "estimated valuation" of such property. As appellant did not have the expense of bringing this property "up the hill," and even saved the cost of taking it "down the hill," why should that item be considered in estimating the value of the property?

The only testimony on the valuation of this property was given by Hornada. Aside altogether from the interest and natural bias of this lone witness, complainant submits that Hornada was not legally qualified as an expert on such values. Hornada never bought nor sold used property of this character; nor did he know the cost price of similar new property either in March, 1917, or at the present time, although conceding that that was an essenttial element in determining the values which he attempted to put on this property.

Competent experts could easily have been obtained by appellant to prove these values, even were such question material on this accounting.

Hornada's testimony as to values should be disregarded as he was not legally qualified as an expert. The only legal proof of value, even if material, is what appellant paid for the property, viz., $300.

B.

Appellees further submit that, in any event, much of what is included in schedule "E" of the account *is not "personal property";* and that, therefore, it legally was not the subject of sale under execution of property of that description and character. And the sale of February 17, 1917, was purely a sale of "personal property."

The California Civil Code provides as follows:

"S. 658. *Real Property.* Real or immovable property consists of:

1. Land;
2. *That which is affixed to land;*
3. That which is incidental or appurtenant to land;
4. *That which is immovable by law.*"

That code also further defines what is deemed under this section to be *"affixed to land,"* in the following language:

> "S. 660. *Fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; are permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws.*"

Most of the items of schedule "E" of the account, surely come within this definition of a *"fixture,"* or

what is deemed under the statute just cited to be *"affixed to land."*

The three different derricks are "imbedded in the land" or certainly "permanently attached" to what is thus imbedded.

The two *camp houses* and the pump house are at least partially "imbedded in the land," or, in any event, are *"permanently resting upon the land,"* within the intent and purpose of the statute.

Likewise the five tanks, which are connected up by various pipes, are "permanently resting upon the land."

The item of *"four wells"* with their casing, is the most aggravated instance of the absurdity of defendant's claim that all the items of schedule "E" are "personal property." Hornada testified that the "well" is simply "the hole in the ground." Certainly, therefore, the "well" is not movable. Whether or not the casing was "permanently attached" to this "hole in the ground," within the intent and purpose of the statute, is best answered by Hornada's testimony as to why defendant had not pulled the casing at wells 1 and 2. He testified that if he had pulled this casing the wells would have caved in; that if he had pulled the casing, naturally the wells would cave in; that to attempt to put it back would be a difficult job; it would mean redrilling the wells, to put them in working condition. *Can it be seriously claimed that a thing which can not be removed without destroying or seriously injuring the property is "personal property" and not a "fixture"?* Yet defendant claims these "holes in the ground" and the cas-

ing therein to be "personal property," and that it owns the same. And it "estimates" the value thereof at $8,000, or almost *one-half of the total estimated value of all the items of property inventoried in schedule "E."*

And further, it is the fact that all the other items of this schedule "E," excepting the "lot of small tools," possibly some loose piping and tubing, and household furniture are "permanently attached" in some way or other to some of the buildings, derricks, or other fixtures on the property. For example, the engines, calf wheels, cables, crown pulleys, boiler, pumping plant and blacksmith shop. Can it be possible that they are not legally attached to the property, so as to be "fixtures" thereon, within the intent and meaning of the statute.

It seems unnecessary to discuss the several items of schedule "E" separately, or the cases particularly applicable to "fixtures" of like character, as the well recognized and well established rule generally applicable to the determination of what are and what are not "fixtures" fully covers all these items. This rule was early stated by the California Supreme Court, and uniformly since then followed. See:

Fratt v. Whittier, 58 Cal. 124, 131,

where it was *held* that,

> "The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that when the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that what-

> ever is essential for the purposes for which the building is used, will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. (Green v. Phillips, 26 Gratt. 752; Shelton v. Ficklin, 32 *Id.* 735.)"

This principle of law, that the fact of the thing being essential for the purpose of the land, is at least one of the main factors in the determination of whether it is a "fixture," or whether it is "affixed to the land" within the intent of the statute, was even earlier recognized by the courts. See:

Merritt v. Judd, 14 Cal. 60;
McKiernan v. Hesse, 51 Cal. 594.

In Merritt v. Judd the California Supreme Court *held* as follows:

> "A steam engine and boiler, fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and *used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture.*"

That case also cited several authorities to like effect as to other fixtures. For example:

A cotton gin attached to the gears in a gin house upon a cotton plantation;

A steam engine, with its fixtures, used to drive a bark mill and pounders;

Mill chain, clogs and bars, being in their appropriate place.

In Goss v. Helbring, 77 Cal. 190, 191, 19 Pac. 277, it was *held*

> "A pump placed in the basement of a building and *planted down on the ground,* and *connected to pipes belonging to water works,* so as to admit steam and water, *is sufficiently affixed to the water works to bring it within the California lien law.*"

What item of schedule "E" can possibly be claimed to be not a "fixture," or not "affixed to the land," within the purpose and intent of this statute as thus interpreted by the court? Complainant submits that, aside from some tools, or miscellaneous and loose equipment, every item of property mentioned in that schedule is either *"imbedded in the land,"* or *"permanently resting upon the land,"* or is *"permanently attached to what is thus permanent."* And, consequently, that all these items of property are "fixtures" and not "personal property"; and that they were not subject to sale as personalty.

While this is the law applicable to "fixtures" in general, there is *also a statute specifically applicable to "fixtures" on mining properties, which unquestionably is controlling in the suit at bar, as it concededly involves only mining lands.*

This is found also in the California Code of Civil Procedure, which provides as follows:

> "S. 661. *Fixtures Attached to Mines.* Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, *and all other machinery or*

tools used in working or developing a mine, are to be deemed affixed to the mine."

The property involved in this suit is concededly mining property, producing crude petroleum.

The question whether the items of property mentioned in schedule "E" of the account are "fixtures" and, therefore, "real property," or are "personal property," must be determined by the provisions of this section of the California Civil Code, and section 660 on the subject of "fixtures" in general.

By this section 661 the general statute is extended as to mining properties so as to include "machinery and tools."

The extent to which the provisions of this section have been applied is shown in

Malone v. Big Flat Gravel Co., 76 Cal. 578, 18 Pac. 772,

where the California Supreme Court *sustained a lien for work* in the blacksmith shop on the property, *in sharpening picks and drills, making pipe, and other like necessary work, on the ground that those tools and machinery are "deemed affixed to the mine."*

Complainant, therefore, further submits that *none of the property mentioned in schedule "E" was subject to sale, or could be sold as "personal property."* And that defendant did not become the owner thereof at the execution sale of February 17, 1917, as claimed in the account.

C.

The property inventoried in schedule "E" of the account should also be considered from another and an entirely different standpoint.

Let it be summed for the purposes of this argument, that appellant did actually purchase it at the execution sale of February 17, 1917.

After this assumed purchase, appellant made no effort to remove its property, but left it on the real property, where and as it had been. And when appellant unlawfully took possession of the realty on March 3, 1917, it proceeded to use what it is thus assumed to have purchased, in the operation of that realty. Since then many repairs have been made on that property, and all the payments therefor are set forth in the account, and appellant seeks credit for the same.

If appellant were such owner, appellees submit that no credit can be given for the cost of repairs thereto. Appellant used its property not at the request or with the consent of complainant, or of his assignor, but solely of its own free will, and in the attempted accomplishment of its own unlawful purposes. On no theory of law or equity would complainant be chargeable with the cost of repairing or replacing any of such property as may have been injured, worn out or destroyed.

The fire of October, 1917, completely destroyed considerable of this property, and also seriously damaged and impaired more. Much of this was rebuilt and replaced by appellant, and the various items of cost in so doing are set up in the account, as claimed credits. So

that appellant asks credit not only for the cost of rebuilding and replacing destroyed property, which it claims to own, but also compensation for the use of such property as was thus rebuilt and replaced.

Under no conditions could appellant be entitled to reimbursement for its voluntary replacing of complainant's property. On what possible theory of law, equity or justice, then, can appellant found a claim of reimbursement for the cost of restoring its own destroyed property?

If appellant were the owner of the property inventoried in schedule "E," then that fact would be an additional ground for disallowing all payments for repairs thereto; and for the rebuilding or replacing of such as was destroyed by the fire.

EIGHTH POINT.

The Intervention of the Trustee Was Properly Permitted.

The intervention of "William H. Cochran as trustee for Pacific Crude Oil Company," was permitted under the provisions of Equity Rule 37, which, in part, is as follows:

> "Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The intervention was primarily brought about by appellant's own argument and contention that "If the said report of the special master should be confirmed as filed, defendant (appellant) might be left subject to another suit or action by the said trustee, for the very same moneys, rents and profits." (Record, p. 476.)

On this contention being made, the honorable trial court itself suggested that the trustee should come in as a party to this suit. See Record, p. 361. And this intervention was accordingly had.

Appellant's arguments against the propriety of the allowance of this intervention will be briefly considered.

A.

The Intervention Was Not Too Late.

In a vain effort to support its contention that this intervention "came too late," appellant cites certain provisions of the California Code of Civil Procedure, and certain decisions thereon. And argues that as by the California Code intervention must be had "before the trial," the intervention in this suit was "too late."

It is, indeed, unfortunate that appellant has not yet discovered where this suit is pending. That it is not in the courts of California, but in the federal courts. And that the practice and procedure in these latter courts is regulated entirely by their own rules.

In as much as the rules of practice in equity—which govern the practice in this suit—distinctly provide that

intervention may be permitted *"at any time,"* it is impossible to even speculate on any grounds in support of appellant's contention.

B.

The Petition to Intervene Did Not Require Any Answer. But, in Any Event, Appellant Was Given Ample Opportunity to Answer the Same.

Appellant concedes that it was given one day within which to answer the petition for leave to intervene; but argues that the honorable trial judge was guilty of "an abuse of discretion" in making such a limited allowance of time.

At the time this petition to intervene came on for hearing the court reporter was not present in court. Consequently, there is no full report of what then transpired. Appellees, however, endeavored to cover the proceedings at that time by the stipulation with appellant's solicitors, which appears at pages 650 to 657 of the Record. On this subject this stipulation is as follows (Record, p. 653):

"It being further stipulated and agreed that at the hearing on the said 'petition to intervene,' on November 30, 1920, the said solicitor for defendants objected to the granting of the said petition without their being allowed to file their answer thereto; that the court then and there held that no answer to the said petition was necessary or required unless the said petition alleged new matter or things other than what was then already of record in the suit; that defendant's solicitor then specified certain portions or allegations of the said peti-

tion which were claimed to be such new matter, and the court thereupon, of its own motion, ordered such designated portions and allegations to be stricken out of and from the said petition, as more particularly appears in the minutes of the court on that day; and that the court then and there also granted said defendants until 10 o'clock A. M. of December 1st, 1920, within which to file answer to the said petition, if they saw fit and desired so to do;"

The court minutes specified in this stipulation will be found at page 493 of the Record. They show what particular portions of the petition to intervene were objected to by appellant, as new matter, and, accordingly, were ordered stricken out.

Unless it be such stricken out portions, this petition presented no matters which had not been already presented in the suit and then already adjudicated upon.

So that this petition, presenting as it did but a resume of the facts and proceedings in this suit, presented nothing which was not already of record herein. It assuredly presented no new issues.

Said petition, therefore, did not need nor reqiure any answer. Nor could any answer or defense be made to the there alleged facts than had been already made thereto.

In any event, the honorable trial judge properly exercised his discretion in fixing the time within which appellant should answer, "If they saw fit and desired so to do." No answer was filed.

C.

The Presence of the Trustee Was Necessary and Proper to a Complete Determination of the Cause.

It is a generally well recognized doctrine that

> "When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case. *Equity will not permit litigation by peacemeal, but will determine the whole controversy, so as to prevent future litigation.*"
>
> Watson v. Sutro, 86 Cal. 500.

In the trial court appellant urged the danger of further litigation against itself, in as much as the trustee was not a party to this suit and would not be bound by any decree herein. And then when the court makes the trustee a party to the suit, and in order to meet this objection, appellant says that the trustee should not have been permitted to come in. What appellant really is thinking is that it is sorry it got him in, for it cuts off at least one of appellant's resources for further litigation. Appellant reminds one of what in olden days was termed "a common scold."

Appellant argues that the trustee "had no interest in the subject matter of this action," and, therefore, it was error to permit him to intervene.

Appellees will rest their answer to this claim on the "interests" which are clearly and unquestionably shown by the petition to intervene (Record, p. 473), and to which this Honorable Court's attention is respectfully requested.

However, the portion of Equity Rule 37 which appellant has selected and *quoted* as the basis of its argument is an unfortunate selection, in as much as it applies strictly to the *original parties* to a suit. *And has positively nothing to do with intervenors.*

The portion of the rule which provides for intervention says:

> *"Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."*

In the trial court *appellant* most forcibly *urged that the presence of this trustee was necessary* to a complete determination of this cause.

Does appellant take back the claim that it then urged?

Appellees respectfully submit that, to avoid further litigation, the presence of this trustee was necessary or at least proper in this suit. And that he was properly permitted to intervene.

NINTH POINT.

The Master's Report Adopted and Applied the Proper Rules of Law, to Appellant's Accounting. And Said Report Was Properly Confirmed.

The special master's report on appellant's accounting of the rents and profits which it has collected and received, is entitled to great commendation. It exhibits great care and thoroughness in preparation.

With his report, the master also filed a "Memorandum Opinion." (Record, p. 399.) That opinion is a quite full presentation of the facts and the law involved on this accounting; and such facts and law are also most ably discussed and applied therein. It is deserving of the fullest and most earnest consideration.

That opinion so fully presents the rules and principles of law and equity on which the master founded and made his report, that but little, if anything, is left to be said by appellees on the subject.

There are, however, certain points in the proceedings before the master, to which appellees would further refer.

Complainant attacked defendant's account on two separate and different theories. First, that as Big Sespe Oil Company was a *wilful trespasser* on the property, it was not entitled to any allowances or credits for other than the taxes which it had paid on the property, which latter credit is provided for by section 702 of the California Code of Civil Procedure. The other theory was that, in any event, numerous items of the filed account were not properly allowable to defendant, even were it found that defendant's trespass on the property was not wilful.

The master adopted this first or general theory, and reported accordingly. His report also, however, segregates, classifies and reports on all the items of the filed account, although no allowance is made therefor, excepting, of course, for the taxes on the realty.

That the master himself found appellant to be a trespasser—and that such finding was made independent of any provision of the interlocutory decree—is clearly evidenced by the master's "Memorandum Opinion," which says (Record, p. 407):

"The *special master is unable to discover in the record of the proceedings in this case, either in the District Court or upon the hearings before him, any evidence to justify the entry upon, or the use and operation of these oil lands by the Big Sespe Oil Company; nor upon the hearings before the special master, does there appear to have been made at any time any serious assertion that such entry, use and operation were sustained by any legal right.* Further, the interlocutory decree, in paragraph 'Eighth' thereof, declares: 'The said purchaser, Big Sespe Oil Company, was not entitled to such possession or occupation of the said real property.' *It seems, therefore, that the defendant's possession, occupation and operation of the property was illegal, and that the defendant was a trespasser thereon.*"

Defendant did not, either in the trial court, or in the proceedings before the master, offer any possible reason, excuse or attempted justification for its trespass. How, therefore, can the finding and conclusion that this trespass was *wilful,* be at all questionable.

Appellant now urges that no "force, threats or intimidation whatever was used by appellant in taking possession." The point of this is beyond understanding. Anyhow, appellant did not have to use any of these methods in its trespass. For was not Hornada —one of appellant's officers, directors and stockholders

—in charge of this property for Cochran, on March 3, 1917? And all Hornada did was to discharge his employer, Cochran; immediately enter into the employ of his own company, this appellant; and as Hornada, himself, testifies, he immediately *took possession* of the property for Big Sespe Oil Company.

Appellant further urges that, until the commencement of this action, "No objection or interference with said possession or occupation was made" by any of the parties in interest.

It is true that no formal legal proceedings were instituted to oust appellant from possession.

But it is not true that Cochran acquiesced in or approved of such possession by appellant. The testimony unquestionably establishes that in the unduly prolonged and futile negotiations with appellant, and in his futile efforts to procure from appellant a statement of what appellant claimed should be paid to it, Cochran was objecting to appellant's possession of the property, and was trying to get appellant out of such possession without resorting to legal proceedings, and becoming subject to the usual delay and expense thereof, such as has finally been forced on him by appellant's misconduct.

Appellant also urges the hardship of the enforcement of the doctrine or rule applied in this suit. As a learned judge once well said, appellant *"can but reflect on its own rashness."* Appellant could and should have observed the well established law. And all its rights in the premises would then have been fully and legally

protected and satisfied. But appellant saw fit, in its lust to acquire this property without any consideration, not only to ignore the law, but to forcibly and knowingly violate it, by seizing and entering upon these lands, without even a suggestion of right or authority, and then operating them as it saw fit, and always as it deemed would best accomplish its ends.

It is with poor grace that such a plea comes from appellant, after its concededly unlawful acts which required the application and enforcement of the rule appellant now inveighs against.

However, if this rule is compared with the other rules of law as to allowances and credits in analogous accountings, it will be readily seen that this rule is not so harsh as, at first glance, it might seem to be. For even under such other rules, but few of appellant's claimed disbursements would be allowable as credits on this accounting.

Summarizing these various rules and allowances and credits, it will be seen that there is no conflict whatsoever between them, as they are based on entirely different conditions, and on different principles of law.

1. *If the trespass be wilful,* then the trespasser is not entitled to allowance for either repairs, improvements or even cost of operation and production.

2. *If the trespass be unintentional, by proven honest mistake,* the trespasser will be allowed *only his actual expenses in procuring the production.*

3. *If one be lawfully in possession* of the real property, in any other capacity than as a tenant, and in the absence of any specific agreement with the owner of the property, to the contrary; he will be allowed credit for only such repairs as were necessary for the preservation of the estate, and for no improvements whatsoever.

Appellees also submit that where any improvements are made on the property, by the trespasser—whether the trespass be wilful or unintentional—such improvements become the property of the owner of the land, without any liability to account therefor. Moreover, under none of these rules, can there be any claim for the cost thereof.

The cases cited in the master's "Memorandum Opinion" are sufficient authority for this first rule.

As authority for the second of these rules, appellees would cite:

St. Clair v. Cash Gold Mining & Milling Co., 47 Pac. 466;

Durand Min. Co. v. Percy Consol. Min. Co., 93 Fed. 166;

E. E. Bolles Woodenware Co. v. U. S., 106 U. S. 432, 27 L. Ed. 230.

The third rule is fully likewise stated in 27 Cyc. 1265. And numerous cases are there cited as authorities for the same.

In support of appellees' contention that the cost of "improvements" are not allowable, see:

Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020.

The summary result of these authorities is:

1. That *under no conditions would appellant be entitled to credits for "improvements"* on the property.

2. That even *if lawfully in possession* of the property—as it concededly was not—appellant would not be entitled to credit for *"repairs," unless the same were "necessary for the preservation of the estate":*

3. That even though appellant's *trespass had been proven to be excusable,* appellant would be allowed only its *actual and necessary expenses in producing the oil* from this property; and

4. That if appellant's trespass was wilful—as has been properly found because there was no *proven* ex*cuse* or justification therefor—appellant is not entitled to any allowances or credits whatsoever, excepting for the paid taxes.

Some of the Salient Established Matters in This Suit.

A.

Appellant has not presented a single meritorious defense to this cause of action. Nor any defense to the merits of the cause which is not purely and simply a technical question of pleading, of practice, or of evidence.

B.

Appellant had no right to the possession or occupation of this property. Yet appellant knowingly and wilfully took such possession, and assumed such occupation. Appellant, consequently, was a trespasser.

C.

Appellant offered no testimony whatsoever to show that such possession and occupation was unintentional or through any mistaken notion of its rights. Consequently, the finding that appellant was a *wilful trespasser* was duly and properly made.

D.

Appellant deliberately and wilfully attempted to increase the amount of the required redemption money, so as to make such redemption prohibitive, or, at least, financially undesirable.

This is shown not only by appellant's conduct and management and operation of the property, but also by numerous items of its account, which appellant sought to have allowed as credits against this redemption money. To discuss all such items, would be to unduly tax the patience of this Honorable Court. Some few will, however, be referred to, so that the true character of the account, and appellant's purposes may be appreciated as the master has found them to be.

Officers' Salaries. Schedule "D" of the account presents certain payments to Clampitt, Mills and Hornada,—appellant's corporate officers — approximating

$1900, which are asserted to be for "Back Salary" which was voted to themselves, some months subsequent to the time that the services were asserted to have been performed.

The law as to such claimed allowances is well settled.

It is a well settled rule that, under no conditions, would appellant be entitled to compensation for its services in the care and management of this property. See:

Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342;
Moss v. Odell, 141 Cal. 335, 74 Pac. 999;
Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93.

Moreover, the master has found (Record, p. 438) that through these so-called "Salary" payments, appellant deliberately attempted to foist the amounts of such payments on the redemption money, while, as clearly shown by the evidence, there were really and, in fact, *"Dividends."*

It is most significant that appellant took no exception to this finding of the master. Nor has appellant assigned any error thereto.

It is also significant that appellant took no exception to the master's disallowance of the payments of so-called "Back Salary" to Mills and Hornada. Nor did appellant assign any error to such disallowance.

Appellant's exception and assigned error are limited to the payments to Clampitt; and even those are based on the theory of *quantum meruit,* and not on the resolution of appellant's directors, under which such payments were at first asserted to have been authorized.

Miscellaneous Payments. Under the heading of *"Miscellaneous Taxes,"* appellant sought allowance for taxes on its "own business and affairs, in no way connected with the subject matter of this suit." (Master's Report, Record, p. 427.) Under the heading of "Bond Premiums," appellant sought allowance for premiums on a bond which it was obliged to give because of its unlawful possession of this property. (Master's Report, Record, p. 428.) Unquestionably the most audacious claim for reimbursement comes under the heading of "Interest on Bank Loans." (Record, p. 428.) The testimony shows that these loans were procured to pay the fees of appellant's attorneys in the prosecution of the very litigation involved in this suit; and also to pay the costs of the sheriff on this execution sale of March 3, 1917. Such audacity could be surpassed only by appellant's asking allowance for the cost of the sheriff's deed which has been adjudged void.

Improvements on the Property. The evidence unquestionably establishes that all the conceded *"Improvements" and practically all so-called "repairs,"* outside of just the usual and ordinary ones, *were made since the commencement of this suit.* In other words, the purpose was, as said in some judicial decision, "To improve the owner out of his redemption," by wrongfully increasing the burden thereof.

Without discussing further items of appellant's account, appellees respectfully submit that the evidence clearly establishes appellant's wilful attempt to wrong-

fully increase the amount of credits and allowances, and thus also increase the amount of the required redemption money.

Not satisfied with this wilful attempt to wrongfully increase the credits and allowances on the redemption money, appellant also actually did wilfully decrease the income from the property.

Decrease of Income From the Property. The evidence shows that immediately after the commencement of this suit on July 2, 1919, the average monthly income from the sale of the oil produced from this property, fell off or was reduced, and that, too, in the face of the fact that the selling price of this oil was several times increased. (See summary of oil runs, "Complainant's Exhibit No. 8," Record, p. 620.) A comparison of the number of runs made in each month since June, 1919, with the number made in the preceding months and subsequent to March, 1917, shows a most striking variation and decrease. And a like comparison of the average monthly production shows a decrease of over one-third in the production after June, 1919. And it is clear from Hornada's testimony that this reduced production cannot be attributed to any trouble with either of the then producing wells, numbers 3 and 4. If any explanation is required of this falling off in production, and the consequent loss of income from the property, it is given in the master's finding that such reduction in income was entirely due to appellant's wilful failure to pump the wells on the property, as they could and should have been pumped.

(Record, p. 453.) Complainant made a point of this fact, before the master, and claimed that appellant should be charged on this accounting, not only with the moneys actually received from the sale of the produced oil, but also with what the property would have earned if it had been operated as "a provident owner could and would have done." (See *Murdock v. Clarke,* 90 Cal. 427, 438, 27 Pac. 278.) While the master found that appellant had not operated the property as it could and should have done, he found that complainant's claim for these further charges was too remote; and, on that ground only, disallowed the same. (Record, p. 452.) The master's reasons for this finding is fully set forth in his memorandum opinion (Record, p. 410.) Appellees have bowed to the master's finding and conclusion. And yet, appellant has the effrontery to ask, "How can it be said that complainant or the judgment debtor was in any wise injured by the possession of appellant?" *There are none so blind as those who will not see.*

TENTH POINT.

The Profits Collected by Appellant, Over and Above the Amount of the Required Redemption Money, Were Properly Ordered to Be Paid Into Court.

It appears that the moneys collected and received by appellant from the sale of the oil produced from this property, not only satisfied and paid all that ap-

pellant was entitled to receive on this redemption, but also were in excess thereof. And by the final decree herein, appellant was required to pay such surplus moneys into court, "Pending this court's further order as to the final disposition thereof." (Record, p. 501.) The Honorable Trial Judge's expressions of opinion on this subject are found at page 361 of the Record.

As appellant had been fully paid all of its redemption money, can it be seriously questioned but that appellant should pay these surplus moneys into court for further and final disposition? Appellant certainly had no claim or right to them.

In the court below, complainant argued that by virtue of the assignment of the right of redemption, he was entitled to receive these surplus moneys. And he based his contention on the case of

> Gordon v. Lewis, 10 Fed. Cas. No. 5613, 2 Summ. 143.

In that case, the bill did not assert any title to such surplus rents and profits. And the question was whether they followed the equity of redemption. In its opinion, the court says:

> "That they do attach to such ownership *de jure,* in the view of a court of equity."

In submitting this question, appellees would say that they do not contend that it is really before this Honorable Court, unless in its wisdom, and to avoid further litigation, this Honorable Court deems it best to consider and pass on the same.

ELEVENTH POINT.

Appellees respectfully submit that the final decree herein should be affirmed as entered.

TWELFTH POINT.

Complainant's Objections to the Filing of the Statement of the Evidence. Also Complainant's Objections to the Extensions of Time for Filing the Record on this Appeal.

Complainant filed in the court below certain specific objections to the lodgement and to the filing of the "Statement of the Evidence" on this appeal. (See Record, p. 365.)

Complainant also filed further objections to the granting of a certain order extending the time within which to file the record on this appeal. (See Record, p. 650.)

This Honorable Court's consideration of all these objections is respectfully requested.

The filing of the "Statement of the Evidence." Complainant's objections to the lodgement, approval and filing of this statement are set forth in detail in the filed "objections." The substance thereof is that this statement was neither lodged, approved or filed during and before the expiration of the term in which this appeal was allowed; and that the order purporting to continue such matters until the next term, "was made without due or any lawful authority whatsoever therefor."

In support of these objections, appellees contend as follows: 1. That the statement must be filed during the term in which the appeal is allowed; 2. That the Honorable District Judge was without lawful authority to extend that term; and 3. That, while in terms this order purported to *"continue* the matter * * * to the next term," it really and in fact either operated as a continuance of the term, or permitted the doing of an act after the expiration of the time contemplated therefor by the statutes.

That the ending of a term also terminates all then pending unfinished matters, is evidenced by the saving provision in section 8 of the Judicial Code. That section provides, in fact, as follows:

> *"When the trial or hearing of any cause* * * * in a district court *has been commenced and is in progress* before a jury or the court, *it shall not be stayed or discontinued* by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened."

If pending and unfinished matters could be continued beyond term, or could the term itself be extended, there certainly would have been no necessity for this express statutory provision. The very limited scope of even this provision is also worthy of consideration on this general question.

Appellees are familiar with the *"per curiam statement"* of the Circuit Court of Appeals for the Sixth

Circuit on this general question, and which is reported in 222 Federal, at page 884.

The fact that what is there said by the Honorable Appellate Court is no more than a "statement" of that court's conclusions, and, even giving to that statement the most respectful consideration, it certainly is not an adjudication on the question here submitted. Therefore, the questions presented by complainant's objections are respectfully submitted for this Honorable Court's consideration and determination.

Orders Extending Time for Filing Record. Appellant procured from the Honorable District Judge certain *ex parte* orders extending appellant's time for filing the record on this appeal. Complainant's above mentioned filed "objections" set forth in detail the grounds of the questions which they consider raised by the making of these orders as was done.

The Honorable District Judge undoubtedly was given full power and authority to make these orders by rule 16 of this Honorable Court.

The questions raised by appellees in connection with these orders are, may such orders be made *ex parte*? And if so, must not notice thereof be given to the other party?

This rule 16 is silent as to any notice of an application for an order such as the one in question. The only requirement of the rule being that the order shall be "filed with the clerk of this court."

But in any event, this rule unquestionably is subject to the General Equity Rules of Practice as adopted by the Supreme Court.

By equity rule 1, it is provided that any district judge, "upon reasonable notice to the parties," may

make orders "whenever the same are not grantable of course."

Equity rule 5 describes what motions are "grantable of course by clerk." Orders such as those now under consideration are not included with the provisions of this rule.

Appellees, therefore, respectfully submit that these orders of extension were not properly granted as no notice of the application therefor was given to the appellees.

Equity rule 4 further provides that "When an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order."

Particular consideration should also be given to the first sentence of this rule 4, which provides that the mere noting of an order in the docket shall not be deemed notice to the parties or their solicitors. This is an absolute reversal of the old equity rule 4, which provided that the entry in the order book was sufficient notice to a party.

In this cause appellees had neither any notice of the application for these orders, nor did they ever receive any notice of the making thereof.

There are three practical aspects of the questions presented by complainant's "objections," to which attention is particularly directed.

1. That if the other party was given notice of the application for an order extending time, in very many

instances he could present facts to the judge which would show that there was no "good cause" for the granting of the order.

2. Even if the order were granted *ex parte,* but a party has notice of the entry thereof, within a reasonable time, he could move to vacate the same, if it was advisable or necessary so to do.

3. If a party has neither notice of an application for the order, nor any notice of the entry thereof, counsel is either bound to inquire from the clerk of this Honorable Court—usually at some distant point—if such an order has been made and filed, or wrongfully to assume that there had been a default in the prosecution of the appeal. In the latter case, he unquestionably would be put to considerable unnecessary trouble and possible expense.

All these questions are submitted to this Honorable Court in the hope that even if this court should hold that the questions are not relevant to the merits of this appeal, the court will at least definitely prescribe the proper practice to be pursued, and thereby save the future uncertainty, not only of the Honorable Judges themselves, but also of the counsel for litigants in general.

All of which is respectfully submitted.

THEODORE MARTIN,
Solicitor for Appellees.

WM. H. COCHRAN,
Of Counsel.